includes both civil and criminal statutes,[28] as well as those statutes authorizing administrative (i.e., regulatory) proceedings.[29] In addition to federal law enforcement, Exemption 7 applies to records compiled to enforce state law,[30] as

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[28] See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 61 (3d Cir. Sept. 21, 1993) (threshold satisfied where FBI investigated allegations of crimes involved in Morro Castle incident); Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 81 & n.46; Williams v. IRS, 479 F.2d 317, 318 (3d Cir.), cert. denied, 414 U.S. 1024 (1973); Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 8 (D.D.C. Aug. 17, 1993) (threshold met by investigation of murder of Postal Service employee); Assassination Archives & Research Ctr. v. United States Dep't of Justice, No. 92-2193, slip op. at 6-7 (D.D.C. Apr. 29, 1993) (threshold met where file compiled in course of FBI investigatory activities to determine possible violations of federal statutes); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 787 (D.D.C. 1993) (threshold met in foreign counterintelligence investigation and by investigation into possible violation of Interstate Transportation of Stolen Property Act) (appeal pending); Abdullah v. FBI, No. 92-356, slip op. at 4 (D.D.C. Aug. 10, 1992) (threshold met by records compiled in course of FBI investigation of drug trafficking) (appeal pending); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 394 (W.D.N.Y. 1992) (USBP form meets threshold because it is generated in investigations of violations of federal immigration law); May v. IRS, No. 90-1123-W-2, slip op. at 6 (W.D. Mo. Dec. 9, 1991) (threshold satisfied by documents compiled as part of criminal and civil investigations involving tax liability); Rodreguez v. United States Postal Serv., No. 90-1886, slip op. at 12 (D.D.C. Oct. 2, 1991) (threshold met where Postal Service information came from documents recording law enforcement agencies' criminal investigations).

[29] See, e.g., Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d at 373 (administrative determination has "salient characteristics of 'law enforcement' contemplated" by Exemption 7 threshold requirement); Johnson v. Federal Bureau of Prisons, No. 90-H-645-E, slip op. at 5-6 (N.D. Ala. Nov. 1, 1990) (documents pertaining to investigation of assault in federal correctional institution, of which plaintiff was found guilty by administrative hearing, meet threshold of Exemption 7); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (documents prepared as part of FTC investigation into advertising practices of cigarette manufacturers satisfy Exemption 7 threshold).

[30] See Hopkinson v. Shillinger, 866 F.2d at 1222 n.27; Wojtczak v. United States Dep't of Justice, 548 F. Supp. 143, 146-48 (E.D. Pa. 1982); see also Shaw v. FBI, 749 F.2d 58, 64 (D.C. Cir. 1984) (authorized federal investigation into the commission of state crime constitutes valid criminal law enforcement investigation, which qualifies confidential source-provided information for protection under the second half of Exemption 7(D)); Rojem v. United States Dep't of Justice, 775 F. Supp. 6, 10 (D.D.C. 1991) (material provided to FBI by state law enforcement agency for assistance in that state agency's criminal investigation is "compiled for law enforcement purposes").

well as foreign law.[31] However, if the agency lacks the authority to pursue a particular law enforcement matter, Exemption 7 protection may not be afforded.[32]

Additionally, "[b]ackground security investigations by governmental units which have authority to conduct such functions" have been held by most courts to meet the threshold tests under the former formulations of Exemption 7.[33]

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[31] See, e.g., Bevis v. Department of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986); see also FOIA Update, Spring 1984, at 6-7.

[32] See, e.g., Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) (CIA's "full background check within the United States of a citizen who never had any relationship with the CIA is not authorized and the law enforcement exemption is accordingly unavailable."); Kuzma v. IRS, 775 F.2d 66, 69 (2d Cir. 1985) ("[u]nauthorized or illegal investigative tactics may not be shielded from public by use of FOIA exemptions"); Miscavige v. IRS, No. 91-3721, slip op. at 2, 5 (C.D. Cal. Dec. 9, 1992) (no law enforcement purpose for post-1986 documents because IRS investigation concluded in 1985) (appeal pending). But see Pratt v. Webster, 673 F.2d 408, 423 (D.C. Cir. 1982) ("Exemption 7 refers to purposes rather than methods"; questionable methods do not defeat exemption's coverage where law enforcement is primary purpose); Iglesias v. FBI, No. G79-350, slip op. at 15 (W.D. Mich. July 3, 1985) (provided a rational nexus can be found between investigation and agency's law enforcement duties, courts will not inquire into legality of agency's methods), subsequent opinion (W.D. Mich. Nov. 18, 1985); Hrones v. CIA, 685 F.2d 13, 19 (1st Cir. 1982) (legality of agency's actions in national security investigation falls outside scope of judicial review in FOIA action); Edwards v. CIA, 512 F. Supp. 689, 694 (D.D.C. 1981) (dictum) (disclosure of sources, methods and identities of those involved in actions outside agency charter not necessarily required because of risks attendant upon public scrutiny).

[33] S. Conf. Rep. 1200, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291; see, e.g., Doe v. United States Dep't of Justice, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (threshold met by background investigation of individual conditionally offered employment as attorney); Miller v. United States, 630 F. Supp. 347, 349 (E.D.N.Y. 1986) (USIA background security investigation of federal job applicant meets Exemption 7 threshold); Block v. FBI, No. 83-813, slip op. at 14-15 (D.D.C. Nov. 19, 1984) (FBI background investigation of applicant for federal employment protectible under Exemption 7); Meeropol v. Smith, No. 85-1121, slip op. at 78 (D.D.C. Feb. 29, 1984) (CIA background investigation falls within threshold of Exemption 7), aff'd in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986); Information Acquisition Corp. v. United States Dep't of Justice, No. 77-839, slip op. at 4-5 (D.D.C. May 23, 1979) (citizen complaint in pre-appointment background investigation of Supreme Court Justice Rehnquist protected pursuant to Exemption 7); DeFina v. FAA, No. 75-1526, slip op. at 16 (S.D.N.Y. Feb. 26, 1976) (FBI background investigation protectible pursuant to Exemption 7); Koch v. Department of Justice, 376 F. Supp. 313, 315 (D.D.C. 1974) (background investigations fell within Exemption 7 because they involved determina-

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Personnel investigations of government employees also are protected if they focus on "specific and potentially unlawful activity by particular employees" of a civil or criminal nature.[34] By contrast, "an agency's general monitoring of its own employees to ensure compliance with the agency's statutory mandate and regulations" does not satisfy Exemption 7's threshold requirement.[35]

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[33](...continued)
tions as to whether applicants had engaged in criminal conduct which would disqualify them for federal employment); see also FOIA Update, Fall 1985, at 6. But see Benson v. United States, No. 80-15-MC, slip op. at 3 (D. Mass. June 12, 1980) (court "not satisfied" that background investigations conducted by the Civil Service Commission are "investigatory records compiled for law enforcement purposes"); Information Acquisition Corp. v. United States Dep't of Justice, No. 77-840, slip op. at 3 (D.D.C. Apr. 7, 1978) (court "not persuaded" that records of pre-appointment background investigation of former Chief Justice Burger qualify for protection under Exemption 7).

[34] Stern v. FBI, 737 F.2d 84, 89 (D.C. Cir. 1984); see also Strang v. Arms Control & Disarmament Agency, 864 F.2d 859, 862 (D.C. Cir. 1989) (agency investigation into employee violation of national security laws); Jackson v. Federal Bureau of Prisons, No. 87-5186, slip op. at 4 (D.C. Cir. Jan. 5, 1988) (prison investigation into allegation that prison official improperly disclosed inmate's personal file does not satisfy threshold without showing that investigation focused on law violation rather than internal personnel matters); Atkin v. EEOC, No. 91-2508, slip op. at 28-29 (D.N.J. June 24, 1993) (threshold met by documents compiled in investigation of agency employees conducted in response to allegations which, if proven, could result in disciplinary proceedings, as well as criminal sanctions); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 6-8 (D. Colo. Mar. 22, 1993) (investigation meets threshold where it pertains to violation of particular federal personnel law); Housley v. United States Dep't of the Treasury, 697 F. Supp. 3, 5 (D.D.C. 1988) (investigation concerning misconduct by special agent, which if proved could have resulted in federal civil or criminal sanctions, satisfies Exemption 7 threshold); Snider v. Mossinghoff, No. 82-2903, slip op. at 2 (D.D.C. Sept. 14, 1983) (investigation concerning attorney's professional conduct meets Exemption 7 threshold); Schwartz v. Department of Justice, No. 76-2039, slip op. at 1-2 (D.D.C. Feb. 9, 1978) (investigation concerning alleged improprieties by Assistant United States Attorney in prosecution of criminal case satisfies Exemption 7 threshold); cf. In re Dep't of Investigation of City of New York, 856 F.2d 481, 485 (2d Cir. 1988) (law enforcement privilege found applicable in discovery context where investigation served "dual purposes of evaluating conduct in office and enforcing the criminal law").

[35] Stern v. FBI, 737 F.2d at 89 (dictum); see also Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 81 (distinguishing between oversight of performance of employees and investigations focusing on specific illegal acts of employees); Fine v. United States Dep't of Energy, 823 F. Supp. 888, 907-08 (D.N.M. 1993) (threshold met by agency with both administrative and law enforcement functions where documents compiled during investigation of specific allegations and not as part of routine oversight); Maryland Coalition for In-
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In determining whether a document was "compiled for law enforcement purposes" under Exemption 7, the courts have in the past generally distinguished between agencies with both law enforcement and administrative functions and those whose principal function is criminal law enforcement.[36] An agency whose functions are "mixed" usually had to show that the records at issue involved the enforcement of a statute or regulation within its authority.[37] Courts have additionally required that the records be compiled for "adjudicative

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[35](...continued)
tegrated Educ., Inc. v. United States Dep't of Educ., No. 89-2851, slip op. at 9-10 (D.D.C. July 20, 1992) (mixed-function agency's documents, compiled as result of its "routine oversight responsibilities," do not meet threshold) (appeal pending); Cotton v. Adams, 798 F. Supp. 22, 25 (D.D.C. 1992) (citing Stern and Rural Hous. Alliance, holding agency's internal investigation of its own employees satisfies threshold only if it focuses directly on illegal acts which could result in criminal or civil sanctions); Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 15 (D.D.C. 1990) (threshold not met for internal investigation into whether employee complied with agency conflict-of-interest regulations); Frets v. Department of Transp., No. 88-404-CV-W-9, slip op. at 4-5 (W.D. Mo. Dec. 14, 1989) (records compiled for FAA investigation into possible drug use by air traffic controller, which could result in dismissal, held not compiled for law enforcement purposes); Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 15 (D. Ariz. July 9, 1987) (internal investigation of shooting death of FBI Special Agent does not meet Exemption 7 threshold). But cf. Nagel v. HEW, 725 F.2d 1438, 1441 (D.C. Cir. 1984) (An "employer's determination whether a federal employee is performing his job adequately constitutes an authorized law enforcement activity" within the meaning of subsection (e)(7) of the Privacy Act of 1974.).

[36] Attorney General's Memorandum at 7.

[37] See Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987) (threshold met where IRS "had a purpose falling within its sphere of enforcement authority in compiling particular documents"); Birch v. United States Postal Serv., 803 F.2d 1206, 1210-11 (D.C. Cir. 1986) (threshold met because enforcement of laws regarding use of mails falls within statutory authority of Postal Service); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 748 (9th Cir. 1979) (remanded for Naval Investigative Service to show investigation involved enforcement of statute or regulation within its authority); Irons v. Bell, 596 F.2d 468, 473 (1st Cir. 1979) (mixed-function agency must demonstrate purpose falling within its sphere of enforcement authority); McCutchen v. HHS, No. 91-142, slip op. at 7 (D.D.C. Aug. 24, 1992) (law enforcement purpose satisfied because records involve enforcement of statute and regulation within agency's authority to investigate scientific fraud) (appeal pending on other grounds); Author Servs., Inc. v. IRS, No. 90-2187, slip op. at 2 n.1 (C.D. Cal. July 30, 1992) (law enforcement purpose not satisfied where documents compiled after termination of IRS investigation); cf. Church of Scientology Int'l v. IRS, 995 F.2d 916, 919 (9th Cir. 1993) ("This court has clearly held that the IRS has the 'requisite law enforcement mandate'" through its enforcement provisions of the federal tax code.).

or enforcement purposes."[38]

In the case of criminal law enforcement agencies, the courts have accorded the government varying degrees of special deference when considering whether their records meet the threshold requirement of Exemption 7.[39] Indeed, the First, Second, and Eighth Circuit Courts of Appeals have adopted a per se rule that qualifies all "investigative" records of criminal law enforcement agencies for protection under Exemption 7.[40] Other courts, while still accord-

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[38] Rural Hous. Alliance v. United States Dep't of Agric., 498 F.2d at 81. See Church of Scientology Int'l v. IRS, 995 F.2d at 919 (IRS Exempt Organizations Division "performs law enforcement function by enforcing provisions of the federal tax code"); see also Church of Scientology v. IRS, No. 90-11069, slip op. at 25 (D. Mass. Apr. 22, 1992) (magistrate's recommendation) (records compiled for law enforcement purpose in connection with IRS inquiry into tax exempt status); Becker v. IRS, No. 91-C-1203, slip op. at 12-13 (N.D. Ill. Mar. 27, 1992) (documents compiled for law enforcement purposes where IRS authorized to investigate illegal tax protesters' strategies and activities); Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, No. 89-707, slip op. at 6-7 (C.D. Cal. Sept. 10. 1991) (law enforcement purpose met where documents compiled for crimes within scope of enforcement authority); May v. IRS, slip op. at 6-7 (documents compiled for law enforcement purposes as part of criminal and civil investigation); see, e.g., Reed v. NLRB, 927 F.2d 1249, 1252 (D.C. Cir. 1991) (dictum) (court gratuitously noted its "skepticism" of government's alternative argument regarding application of Exemption 7(C)'s threshold to lists of names and addresses of eligible voters in union representative election compiled for NLRB compliance purposes), cert. denied, 112 S. Ct. 912 (1992); Author Servs., Inc. v. IRS, slip op. at 6 (IRS has not met burden of identifying alleged illegal act with sufficient specificity for court to determine whether mixed-function agency acting within its law enforcement mandate).

[39] Compare, e.g., Pratt v. Webster, 673 F.2d at 416-18 with Kuehnert v. FBI, 620 F.2d 662, 666-67 (8th Cir. 1980).

[40] First Circuit: Curran v. Department of Justice, 813 F.2d 473, 475 (1st Cir. 1987) (investigatory records of law enforcement agencies are "inherently" compiled for law enforcement purposes); Irons v. Bell, 596 F.2d at 474-76 ("investigatory records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7"); Second Circuit: Ferguson v. FBI, 957 F.2d 1059, 1070 (2d Cir. 1992) ("no room for [a] district court's inquiry into whether the FBI's asserted law enforcement purpose was legitimate"); Williams v. FBI, 730 F.2d 882, 884-85 (2d Cir. 1984) (records of a law enforcement agency given "absolute protection" even if "records were compiled in the course of an unwise, meritless or even illegal investigation"); Eighth Circuit: Kuehnert v. FBI, 620 F.2d at 666 (FBI need not show law enforcement purpose of particular investigation as precondition to invoking Exemption 7). See also Arenberg v. DEA, 849 F.2d 579, 581 (11th Cir. 1988) (applicable standard not articulated, but suggesting courts should be "hesitant" to reexamine law enforcement agency's decision to

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ing significant deference to criminal law enforcement agencies, have held that an agency must demonstrate some specific nexus between the records and a proper law enforcement purpose.[41]

The existing standard for review of criminal records in the Court of Appeals for the District of Columbia Circuit is somewhat more stringent than the per se rule discussed above. The D.C. Circuit held in Pratt v. Webster that records generated as part of a counterintelligence program of questionable legality which was part of an otherwise clearly authorized law enforcement investigation met the threshold requirement for Exemption 7 and rejected the per

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[40](...continued)
investigate if there is plausible basis for agency's decision); Binion v. United States Dep't of Justice, 695 F.2d 1189, 1193-94 (9th Cir. 1983) ("a fortiori" approach appropriate where FBI pardon investigation was "clearly legitimate"); Struth v. FBI, 673 F. Supp. 949, 961 (E.D. Wis. 1987) (interpreting Stein v. Department of Justice, 662 F.2d 1245, 1260-61 (7th Cir. 1981), as following per se approach); Black v. FBI, No. 82-370, slip op. at 3 (N.D. Ohio May 30, 1986) ("court will conclusively presume that the investigation which generated the document was undertaken for a law enforcement purpose").

[41] See, e.g., Jones v. FBI, No. C77-1001, slip op. at 10-11 (N.D. Ohio Aug. 12, 1992) (holding that even under rational nexus test, FBI documents involving alleged abduction and shooting plainly were complied for proper law enforcement purpose because "even if the investigation was part of COINTELPRO, COINTELPRO investigations were not per se illegitimate") (appeal pending); Rosenfeld v. United States Dep't of Justice, 761 F. Supp. 1440, 1445-48 (N.D. Cal. 1991) (FBI investigation of Free Speech Movement "was begun in good faith and with a plausible basis," but ceased to have "colorable claim [of rationality] as the evidence accumulated" and became "a case of routine monitoring . . . for intelligence purposes"; date at which FBI's initial law enforcement-related suspicions were "demonstrably unfounded" was "cut-off point for the scope of a law enforcement purpose" under Exemption 7) (appeal pending); Siminoski v. FBI, No. 83-6499, slip op. at 25 (C.D. Cal. Jan. 16, 1990) (question is not whether investigations were "upstanding" or "appealing," but whether agency was authorized to undertake investigations of such nature); Friedman v. FBI, 605 F. Supp. 306, 321 (N.D. Ga. 1984) (review of records showed that FBI was "'gathering information with the good faith belief that the subject may violate or has violated federal law' rather than 'merely monitoring the subject for purposes unrelated to enforcement of federal law'" (quoting Lamont v. Department of Justice, 475 F. Supp. 761, 770 (S.D.N.Y. 1979))); Malizia v. United States Dep't of Justice, 519 F. Supp. 338, 347 (S.D.N.Y. 1981) (in order to qualify for Exemption 7 protection, "agency must demonstrate at least a 'colorable claim of a rational nexus' between activities being investigated and violations of federal laws"); see also Powell v. United States , 584 F. Supp. 1508, 1522 (N.D. Cal. 1984) (in camera inspection required to determine whether FBI investigation of legal defense committees was "realistically based on a legitimate concern" that the committees' actions threatened the national security), summary judgment granted in pertinent part, No. C-82-326 (N.D. Cal. Mar. 27, 1985).

se approach.[42] Instead, it adopted a two-part test for determining whether the threshold for Exemption 7 has been met: (1) whether the agency's investigatory activities that give rise to the documents sought are related to the enforcement of federal laws or to the maintenance of national security; and (2) whether the nexus between the investigation and one of the agency's law enforcement duties is based on information sufficient to support at least a colorable claim of rationality.[43]

Since the removal of the word "investigatory" from the threshold requirement of Exemption 7, the D.C. Circuit has had few opportunities to reconsider the Pratt test, a portion of which expressly requires a nexus between requested records and an investigation.[44] In Keys v. United States Department of Justice, however, the D.C. Circuit modified the language of the Pratt test to reflect those amendments and to require that an agency demonstrate the existence of a nexus "between [its] activity" (rather than its investigation) "and its law enforcement duties."[45] Although not specifically relying on the amended test, the D.C. Circuit in Keys held that records compiled solely because the subject had a known affiliation with organizations that were strongly suspected of harboring Communists met the Exemption 7 threshold.[46] Nevertheless, as no

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[42] See 673 F.2d at 416 n.17.

[43] Id. at 420-21; see also, e.g., Keys v. United States Dep't of Justice, 830 F.2d 337, 340 (D.C. Cir. 1987); King v. United States Dep't of Justice, 830 F.2d 210, 229 (D.C. Cir. 1987); Laborers' Int'l Union v. United States Dep't of Justice, 772 F.2d 919, 921 (D.C. Cir. 1984) (Pratt is "governing legal standard"); Founding Church of Scientology v. Smith, 721 F.2d 828, 829 n.1 (D.C. Cir. 1983); cf. Shaw v. FBI, 749 F.2d at 63 (Pratt standard applies as well to second half of Exemption 7(D)).

[44] See, e.g., King v. United States Dep't of Justice, 830 F.2d at 229 n.141 (dictum) (1986 FOIA amendments did not "qualif[y] the authority of Pratt" test).

[45] 830 F.2d at 340; see also Rochon v. Department of Justice, No. 88-5075, slip op. at 3 (D.C. Cir. Sept. 14, 1988) (agency must demonstrate nexus between its compilation of records and its law enforcement duties); Abdullah v. FBI, slip op. at 3 ("[L]aw enforcement agencies such as the FBI must show that the records at issue are related to the enforcement of federal laws and that the law enforcement activity was within the law enforcement duty of that agency."); Beck v. United States Dep't of Justice, No. 87-3356, slip op. at 26-27 (D.D.C. Nov. 7, 1989) ("[D]efendants must merely establish that the nexus between the agency's activity and its law enforcement duty" is based on a "colorable claim of rationality."). But see Simon v. Department of Justice, 980 F.2d 782, 783 (D.C. Cir. 1992) (agency must demonstrate nexus between investigation and one of its law enforcement duties (citing Pratt v. Webster, 673 F.2d at 420-21); Assassination Archives & Research Ctr. v. United States Dep't of Justice, slip op. at 6 (government must establish that investigation related to enforcement of federal law and raise colorable claim investigation rationally related to one or more of agency's law enforcement duties).

[46] 830 F.2d at 341-42.

appellate decision has yet employed the modified Pratt test adopted by Keys, the impact of this change in the threshold is still not entirely clear.

Even under the test enunciated in Pratt, significant deference has been accorded criminal law enforcement agencies.[47] Nevertheless, the D.C. Circuit has indicated in Pratt and elsewhere that if an investigation is shown to have been in fact conducted for an improper purpose, Exemption 7 may not be applicable to the records of that investigation.[48]

The full effects of the 1986 FOIA amendments on the parameters of Exemption 7's threshold still remain to be seen. As courts now apply the plain meaning of its language in the absence of any "investigatory" requirement, it will command the careful attention of all federal agencies who wish to consider the extent to which, if at all, any of their records may now qualify for possible Exemption 7 protection. For the principal federal law enforcement agencies, this means that any record previously not considered covered by Exemption 7

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[47] See 673 F.2d at 421 ("a court should be hesitant to second-guess a law enforcement agency's decision to investigate if there is a plausible basis for its decision"); see also, e.g., Keys v. United States Dep't of Justice, 830 F.2d at 344 (court generally "understood" former requirement that records be "investigatory" "to impose little substantive limitation on the exemption independent of the finding of a qualifying purpose"); King v. United States Dep't of Justice, 830 F.2d at 230-32 (subject's close association with "individuals and organizations . . . of investigative interest to the FBI" and consequent investigation of subject during the McCarthy era for possible violation of national security laws meets threshold in the absence of evidence supporting the existence of an improper purpose); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 18 (D.D.C. 1990) (Given the subject's prior passivist activities, it was not "irrational or implausible for [FBI]--operating in the climate existing during the early 1950's--[to conduct] what appears to have been a brief criminal investigation into the possibility that the plaintiff harbored Communist affiliations."), aff'd on other grounds, 980 F.2d 782 (D.C. Cir. 1992); Doe v. United States Dep't of Justice, No. 86-1050, slip op. at 2-4 (D.D.C. Sept. 4, 1987) (citing pre-amendment language of Exemption 7, court noted that expense and other administrative records concerning FBI informant met lesser burden imposed on law enforcement agencies to show records are compiled for law enforcement purposes); Abramson v. FBI, 566 F. Supp. 1371, 1375 (D.D.C. 1983) (dictum) (plausible though unlikely explanation of law enforcement purpose is "colorable" explanation sufficient to meet second part of Pratt test).

[48] See Pratt v. Webster, 673 F.2d at 420-21 (Exemption 7 not intended to "include investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to the national security and violations of the criminal laws and of apprehending those who do violate the laws"); Shaw v. FBI, 749 F.2d at 63 ("mere existence of a plausible criminal investigatory reason to investigate would not protect the files of an inquiry explicitly conducted . . . for purposes of harassment"); Lesar v. United States Dep't of Justice, 636 F.2d at 487 (questioning whether records that were generated after investigation "wrongly strayed beyond its original law enforcement scope" would meet threshold test for Exemption 7).

due solely to its noninvestigatory character likely is sufficiently related to the agency's general law enforcement mission that it can be considered for Exemption 7 protection.

Because of the significance of this change in the coverage of Exemption 7, it is important that other agencies be alert to and carefully consider the extent to which any of their records, albeit noninvestigatory, are so directly related to a specific law enforcement activity that they might reasonably qualify for any necessary protection under one of Exemption 7's subparts; such records as law enforcement manuals, background investigation documents, and program oversight reports can be prime candidates for such consideration.[49] The full effects of these amendments, however, will be realized only upon the case-by-case identification of particular items of noninvestigatory law enforcement information, the continued disclosure of which could cause one of the harms specified in Exemption 7's six subparts.

EXEMPTION 7(A)

The first subpart of Exemption 7, Exemption 7(A), authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."[1] The Freedom of Information Reform Act of 1986 lessened the showing of harm required from a demonstration that release "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings.[2]

Determining the applicability of this Exemption 7 subsection thus requires a two-step analysis focusing on: (1) whether a law enforcement proceeding is pending or prospective; and (2) whether release of information about it could reasonably be expected to cause some articulable harm. The courts have held that the mere pendency of enforcement proceedings is an inadequate basis for the invocation of Exemption 7(A); the government must also establish that some distinct harm is likely to result if the record or information requested is disclosed.[3] The Court of Appeals for the District of Columbia Circuit has gone

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[49] Attorney General's Memorandum at 8-9.

[1] 5 U.S.C. § 552(b)(7)(A) (1988).

[2] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 10 (Dec. 1987) [hereinafter Attorney General's Memorandum].

[3] See, e.g., Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64, 65-67 (D.C. Cir. 1986); Abdullah v. FBI, No. 92-356, slip op. at 4-5 (D.D.C. Aug. 10, 1992) (simple fact that information related to pending or prospective law enforcement proceeding does not, in and of itself, justify "wholesale" withholding; agency "must show that disclosure could reasonably be expected perceptibly to interfere with an enforcement proceeding") (appeal (continued...)

so far as to hold that the fact that a judge in a criminal trial specifically delayed disclosure of certain documents until the end of the trial is alone insufficient to establish interference with that ongoing proceeding.[4]

Although it still remains for further development of case law under the 1986 FOIA amendments to determine the precise applicability of Exemption 7(A) in its amended form, it is instructive to look at pre-amendment cases. With regard to the first step of the Exemption 7(A) analysis, the legislative history as well as judicial interpretations of congressional intent of this subsection as it was originally enacted make clear that Exemption 7(A) was not intended to "endlessly protect material simply because it [is] in an investigatory file."[5] Rather, Exemption 7(A) is temporal in nature and, as a general rule, may be invoked as long as the proceeding remains pending,[6] or so long as the proceeding is fairly regarded as prospective[7] or as preventative.[8]

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[3](...continued)
pending); LeMaine v. IRS, No. 89-2914, slip op. at 13 (D. Mass. Dec. 10, 1991) (no showing that release would result in any specific harm).

[4] North v. Walsh, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (standard is "whether disclosure can reasonably be expected to interfere in a palpable, particular way" with enforcement proceedings).

[5] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978).

[6] See, e.g., Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984) (NLRB administrative practice of continuing to assert Exemption 7(A) for six-month "buffer period" after termination of proceedings found to be "arbitrary and capricious"); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (once enforcement proceedings are "either concluded or abandoned, exemption 7(A) will no longer apply"); Kilroy v. NLRB, 633 F. Supp. 136, 142, 143 (S.D. Ohio 1985) (Exemption 7(A) "applies only when a law enforcement proceeding is pending."), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite); Antonsen v. United States Dep't of Justice, No. K-82-008, slip op. at 9-10 (D. Alaska Mar. 20, 1984) ("It is difficult to conceive how the disclosure of these materials could have interfered with any enforcement proceedings" after a criminal defendant had been tried and convicted.).

[7] See, e.g., Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (Service Lookout Book, containing "names of violators, alleged violators and suspected violators," is protected as proceedings clearly are at least prospective against each violator.); Marzen v. HHS, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (Exemption 7(A) prohibits disclosure of law enforcement records where release "would interfere with enforcement proceedings, pending, contemplated, or in the future."), aff'd, 825 F.2d 1148 (7th Cir. 1987); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (Exemption 7(A) applicable where enforcement proceeding "in prospect").

[8] See, e.g., Moorefield v. United States Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (material pertaining to "Secret Service investigations carried out pursuant to the Service's protective function," i.e., to prevent harm to protec-
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Exemption 7(A) remains viable throughout the duration of long-term investigations.[9] For example, it has been held applicable to the FBI's 16-year investigation into the disappearance of Jimmy Hoffa.[10] Even where an investigation is dormant, Exemption 7(A) has been held to be applicable because of the possibility that the investigation could lead to a "prospective law enforcement proceeding."[11] The "prospective" proceeding, however, must be a concrete possibility, rather than a mere hypothetical one.[12]

Further, even after an investigation is closed the exemption may be applicable if disclosure could be expected to interfere with a related, pending enforcement proceeding.[13] Indeed, in one of the first district court cases to ap-

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[8](...continued)
tees, held eligible for Exemption 7(A) protection), cert. denied, 449 U.S. 909 (1980); see also Brinkerhoff v. Montoya, 3 Gov't Disclosure Serv. (P-H) ¶ 82,421, at 83,055 (N.D. Tex. July 1, 1981) (fact that judicial adjudication is not "imminent" held not dispositive of applicability of Exemption 7(A)).

[9] See Africa Fund v. Mosbacher, No. 92-289, slip op. at 10 (S.D.N.Y. May 26, 1993) (documents that would interfere with lengthy or delayed investigation fall within protective ambit of Exemption 7(A)).

[10] Dickerson v. Department of Justice, 992 F.2d 1426, 1432 (6th Cir. 1993) (affirming district court's conclusion that FBI's investigation into 1975 disappearance of Jimmy Hoffa remains ongoing and therefore is still a "prospective" law enforcement proceeding).

[11] See, e.g., National Pub. Radio v. Bell, 431 F. Supp. 509, 514-15 (D.D.C. 1977); see also FOIA Update, Spring 1984, at 6.

[12] See Badran v. United States Dep't of Justice, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987) (relying on pre-amendment language, court held that mere possibility that person mentioned in file might some day violate law was insufficient to invoke Exemption 7(A)); National Pub. Radio v. Bell, 431 F. Supp. at 514 (Exemption 7(A) applicable where investigation, though in dormant stage, "is nonetheless an 'active' one which will hopefully lead to a 'prospective law enforcement proceeding'"); see also 120 Cong. Rec. S9329 (daily ed. May 30, 1974) (statement of Sen. Hart).

[13] See, e.g., New England Medical Ctr. Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976) (Exemption 7(A) applicable "where subject matter of closed file complaint is contemporaneous and so intimately connected with that of the pending enforcement proceeding"); Engelking v. DEA, No. 91-165, slip op. at 6 (D.D.C. Nov. 30, 1992) (fugitive discussed in requester's file was still at large and release of information could jeopardize current investigation) (appeal pending); Warmack v. Huff, No. 88-H-1191-E, slip op. at 22-23 (N.D. Ala. May 16, 1990) (Exemption 7(A) applicable to documents in multidefendant case involving four untried fugitives), aff'd, 949 F.2d 1162 (11th Cir. 1991) (table cite); Freedberg v. Department of the Navy, 581 F. Supp. 3, 4 (D.D.C. 1982) (Exemption 7(A) applicable where two murderers convicted, but two others remained at large); Automobile Importers of Am., Inc. v. FTC, 3 Gov't Dis-
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ply Exemption 7(A)'s amended language, it was held that records concerning proceedings now closed that were still a part of a related case in which an indictment had been issued remained protected under the exemption.[14] Exemption 7(A) protection also applies to concluded proceedings that are subject to pending motions for new trials.[15]

Similarly, Exemption 7(A) also may be invoked where an investigation has been terminated but an agency retains oversight or some other continuing enforcement-related responsibility.[16] In a case decided under Exemption 7(A) as amended, it was held that although the unfair labor practice proceeding involved had been closed, the exemption still protected impounded ballots because their disclosure could interfere with the NLRB's responsibility to conduct and

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[13](...continued)
closure Serv. (P-H) ¶ 82,488, at 83,227 (D.D.C. Sept. 28, 1982) (FTC memoranda discussing general remedies found properly withheld pursuant to Exemption 7(A) because some proceedings still pending); see also FOIA Update, Spring 1984, at 6; cf. Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 578 (D.C. Cir. 1987) (relying on language of statute prior to 1986 amendments, case remanded for additional explanation of why no segregable portions of documents could be released without interference to related proceedings).

[14] Dickie v. Department of the Treasury, No. 86-649, slip op. at 8 (D.D.C. Mar. 31, 1987) (release of documents from closed federal prosecution could jeopardize pending state criminal proceedings).

[15] Neill v. United States Dep't of Justice, No. 91-3319, slip op. at 5 (D.D.C. July 20, 1993) (requester granted new trial; release of records "could reasonably be expected to harm the pending proceeding"); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 10 (D.D.C. Sept. 24, 1992) (Exemption 7(A) protection for information where "only pending criminal proceeding" is appeal of denial of new trial motion; "disclosures reasonably could be expected to genuinely harm" government's case).

[16] See, e.g., Alaska Pulp Corp. v. NLRB, No. 90-1510D, slip op. at 2 (W.D. Wash. Nov. 4, 1991) (Exemption 7(A) remains applicable where corporation found liable for unfair labor practices, but parties remain embroiled in controversy as to compliance); Crooker v. Bureau of Alcohol, Tobacco & Firearms, No. 83-1646, slip op. at 1-2 (D.D.C. Apr. 30, 1984) (Exemption 7(A) remains applicable while motion to withdraw guilty plea still pending); Erb v. United States Dep't of Justice, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (investigation "concluded 'for the time being'" subsequently reopened); ABC Home Health Servs., Inc. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) ("final settlement" subject to reevaluation for at least three years); Timken Co. v. United States Customs Serv., 531 F. Supp. 194, 199-200 (D.D.C. 1981) (final determination could be challenged or appealed); Zeller v. United States, 467 F. Supp. 487, 501 (S.D.N.Y. 1979) (records compiled to determine whether party is complying with consent decree). But see Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 751-55 (D.D.C. 1983) (records concerning modification of consent decree held not exempt).

process future collective bargaining representation elections.[17]

The "law enforcement proceedings" to which Exemption 7(A) may be applicable have been interpreted broadly. Such proceedings have been held to include not only criminal actions,[18] but civil actions[19] and regulatory proceedings[20] as well. They include "cases in which the agency has the initiative in bringing an enforcement action and those . . . in which it must be prepared to respond to a third party's challenge."[21] Enforcement proceedings in state courts[22] and foreign courts[23] also qualify for Exemption 7(A) protection. However, in order to satisfy the "law enforcement proceedings" requirement of Exemption 7(A), an agency must be able to point to a specific pending or contemplated law enforcement proceeding which could be harmed by disclosure.[24]

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[17] Injex Indus. v. NLRB, 699 F. Supp. 1417, 1420 (N.D. Cal. 1986).

[18] See, e.g., Gould Inc. v. GSA, 688 F. Supp. 689, 701 (D.D.C. 1988); National Pub. Radio v. Bell, 431 F. Supp. at 510.

[19] See, e.g., Bender v. Inspector Gen. NASA, No. 90-2059, slip op. at 1-2, 8 (N.D. Ohio May 24, 1990) (information relating to "official reprimand" reasonably expected to interfere with government's proceeding to recover damages "currently pending" before same court).

[20] See, e.g., Farm Fresh, Inc. v. NLRB, No. 91-603-N, slip op. at 1, 7-9 (E.D. Va. Nov. 15, 1991) (NLRB's unfair labor practice action constitutes law enforcement proceedings; disclosure of audiotape of meeting between employees and managers likely to interfere with NLRB's ongoing enforcement proceeding); Alaska Pulp Corp. v. NLRB, slip op. at 2, 5 (after finding of unfair labor practice, compliance investigation to determine back pay awards constitutes enforcement proceedings); Concrete Constr. Co. v. United States Dep't of Labor, No. C2-89-649, slip op. at 2-6 (S.D. Ohio Oct. 26, 1990) (Department of Labor's regulation and inspection of construction sites constitute enforcement proceedings); Injex Indus. v. NLRB, 699 F. Supp. at 1420 (NLRB's responsibility to process collective bargaining representation elections constitutes law enforcement proceedings); Fedders Corp. v. FTC, 494 F. Supp. 325, 327-28 (S.D.N.Y.), aff'd, 646 F.2d 560 (2d Cir. 1980) (table cite).

[21] Mapother v. Department of Justice, No. 92-5261, slip op. at 13 (D.C. Cir. Sept. 17, 1993) (to be published).

[22] See, e.g., Dickie v. Department of the Treasury, slip op. at 8 (release could jeopardize pending state criminal proceedings).

[23] See, e.g., Bevis v. Department of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986).

[24] See Mapother v. Department of Justice, slip op. at 16-17 ("We believe that a categorical approach is appropriate in determining the likelihood of enforcement proceedings in cases where an alien is excluded from entry into the United States because of his alleged participation in Nazi persecutions on

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EXEMPTION 7(A)

With respect to the showing of harm to law enforcement proceedings required to invoke Exemption 7(A), the Supreme Court has rejected the position that "interference" must always be established on a document-by-document basis, and it has held that a determination of the exemption's applicability may be made "generically," based on the categorical types of records involved.[25] Indeed, the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press emphatically affirmed the vitality of its Robbins Tire approach and further extended it to include situations arising under other FOIA exemptions in which records can be entitled to protection on a "categorical" basis.[26] Thus, almost all courts have accepted affidavits in Exemption 7(A) cases that specify the distinct, generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive detailed itemizations of each document.[27]

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[24](...continued)
genocide. Otherwise, we must exercise our faculties as mind-readers."); National Sec. Archive v. FBI, 759 F. Supp. 872, 883 (D.D.C. 1991) (FBI's justification that disclosure would interfere with its overall counterintelligence program "must be rejected" as too general to be type of proceeding cognizable under Exemption 7(A); FBI permitted to demonstrate whether there existed any specific pending or contemplated law enforcement proceedings).

[25] NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 236.

[26] 489 U.S. 749, 776-80 (1989) (Exemption 7(C)).

[27] Dickerson v. Department of Justice, 992 F.2d at 1431 ("often feasible for courts to make 'generic determinations' about interference"); accord In re Dep't of Justice, 999 F.2d 1302, 1308 (8th Cir. 1993) (en banc) ("Supreme Court has consistently interpreted Exemption 7 of the FOIA (specifically so far subsections 7(A), 7(C), and 7(D))" to permit government to proceed on "categorical basis" to justify nondisclosure; government not required to produce document-by-document Vaughn Index); see, e.g., Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987); Spannaus v. United States Dep't of Justice, 813 F.2d 1285, 1288-89 (4th Cir. 1987); Curran v. Department of Justice, 813 F.2d 473, 475 (1st Cir. 1987); Bevis v. Department of State, 801 F.2d at 1389 (agency may take "generic approach, grouping documents into relevant categories"); Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982) ("The government may focus upon categories of records . . . under Exemption 7(A)."); Barney v. IRS, 618 F.2d at 1271 n.5; Moorefield v. United States Secret Serv., 611 F.2d at 1022; Abdullah v. FBI, slip op. at 5 (agency's categorical affidavit demonstrates disclosure could reasonably be expected to interfere with ongoing drug trafficking investigation); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 806 (D.N.J. 1993) (agency's generic affidavit demonstrates disclosure would interfere with ongoing criminal investigation); Spannaus v. United States Dep't of Justice, No. 85-1015-K, slip op. at 3 (D. Mass. Jan. 6, 1992) (government may take generic approach and group documents by categories); Kacilauskas v. Department of Justice, 565 F. Supp. 546, 548-49 (N.D. Ill. 1983) (noting that with exception of one case, "all post-Robbins district and appellate court decisions have heeded the Supreme Court's teachings" and "have focused on the
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Specific guidance has been provided by the Courts of Appeals for the First, Fourth and D.C. Circuits as to what constitutes an adequate "generic category" in an Exemption 7(A) affidavit.[28] The general principle uniting these cases is that affidavits must provide at least a general, "functional" description of the types of documents at issue sufficient to indicate the type of interference threatening the law enforcement proceeding.[29] It should be noted, however, that both the First and the Fourth Circuits have approved a "miscellaneous" category of "other sundry items of information."[30] The D.C. Circuit has not yet specifically addressed an affidavit with such a category.

The functional test set forth by the D.C. Circuit does not require a detailed showing that release of the records is likely to interfere with the law enforcement proceedings; it is sufficient for the agency to make a generalized showing that release of these particular kinds of documents would generally

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[27](...continued)
type of records involved rather than their individual content"); see also FOIA Update, Spring 1984, at 3-4 ("FOIA Counselor: The 'Generic' Aspect of Exemption 7(A)"); cf. Lewis v. IRS, 823 F.2d 375, 378-79 (9th Cir. 1987) (records described in opinion only as containing information relating to pending criminal investigation found sufficient).

[28] See Spannaus v. United States Dep't of Justice, 813 F.2d at 1287, 1289 ("details regarding initial allegations giving rise to this investigation; notification of [FBI Headquarters] of the allegations and ensuing investigation; interviews with witnesses and subjects; investigative reports furnished to the prosecuting attorneys," and similar categories all sufficient); Curran v. Department of Justice, 813 F.2d at 476 (same); Bevis v. Department of State, 801 F.2d at 1390 ("identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" sufficient; categories "identified only as 'teletypes,' 'airtels,' or 'letters'" insufficient).

[29] See, e.g., Curran v. Department of Justice, 813 F.2d at 475 ("Withal, a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag."); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d at 67 ("The hallmark of an acceptable Robbins category is thus that it is functional; it allows the court to trace a rational link between the nature of the document and the alleged likely interference."); cf. SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 6 n.3 (D.D.C. May 19, 1988) (agency "file" is not sufficient generic category to justify withholding pursuant to Exemption 7(A)), aff'd in part, rev'd in part on other grounds & remanded, 926 F.2d 1197 (D.C. Cir. 1991); Pruitt Elec. Co. v. United States Dep't of Labor, 587 F. Supp. 893, 895-96 (N.D. Tex. 1984) (disclosure of reference material consulted by investigator that might aid an unspecified target in unspecified manner found not to cause interference).

[30] Spannaus v. United States Dep't of Justice, 813 F.2d at 1287, 1289; Curran v. Department of Justice, 813 F.2d at 476 (wide range of records made some generality "understandable--and probably essential").

interfere with enforcement proceedings.[31] Making this showing should be easier under the amended language of the statute.[32]

On a related procedural issue, the D.C. Circuit in Bevis v. Department of State, held that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs."[33] (See discussion of "Vaughn Index" under Litigation Considerations, below.)

It has generally been recognized that once Exemption 7(A) applicability ceases with changed circumstances, an agency then may invoke other applicable exemptions. As a result, when entire documents are determined to be protectible under Exemption 7(A), agencies generally need not consider what other exemptions are appropriate until the underlying investigation reaches a point at which the documents no longer merit Exemption 7(A) protection.[34] (See Waiver of Exemptions subsection under Litigation Considerations, below.) It also has been held that an agency is not expected to monitor the investigation after completion of the FOIA administrative process and to process the documents once the investigation is closed.[35]

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[31] See Gould Inc. v. GSA, 688 F. Supp. at 703-04 n.34; Alyeska Pipeline Serv. Co. v. EPA, No. 86-2176, slip op. at 6-7 (D.D.C. Sept. 9, 1987) (government need not "show that intimidation will certainly result," but it must "show that the possibility of witness intimidation exists"), aff'd, 856 F.2d 309 (D.C. Cir. 1988).

[32] See Gould Inc. v. GSA, 688 F. Supp. at 703 n.33 (1986 FOIA amendments "relaxed the standard of demonstrating interference with enforcement proceedings").

[33] 801 F.2d at 1389; accord In re Dep't of Justice, 999 F.2d at 1309 (The "government may meet its burden by . . . conducting a document-by-document review to assign documents to proper categories."); Hillcrest Equities, Inc. v. United States Dep't of Justice, No. CA3-85-2351-R, slip op. at 7 (N.D. Tex. Jan. 26, 1987) (government must review each document to determine category in which it belongs).

[34] See Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 589 ("district court did not abuse its discretion in permitting the DOJ to press additional FOIA exemptions after its original, all-encompassing (7)(A) exemption claim became moot"); Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (government not barred from invoking other exemptions after reliance on Exemption 7(A) rendered untenable by conclusion of underlying law enforcement proceeding). But see Curcio v. FBI, No. 89-941, slip op. at 11-12 (D.D.C. Nov. 2, 1990) (where Exemption 7(A) no longer applicable, agency may not raise additional exemption claims at later stage of district court litigation) (motion for reconsideration pending).

[35] Church of Scientology v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) (An "agency is not required to monitor the investigation and release the documents once the investigation is closed and there is no reasonable possibility

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The courts have long accepted that Congress intended that Exemption 7(A) apply "whenever the government's case in court would be harmed by the premature release of evidence or information,"[36] or where disclosure would impede any necessary investigation prior to the enforcement proceeding.[37] In

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[35](...continued)
of future proceedings.") (appeal pending); see also Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) ("To require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing."); cf. Lesar v. United States Dep't of Justice, 636 F.2d 472, 480 (D.C. Cir. 1980) (remanding FOIA cases whenever new classification schemes are established would delay FOIA processing).

[36] NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 232; Mapother v. Department of Justice, slip op. at 18 (release of prosecutor's index of all documents he deems relevant would provide "critical insightss into [government's] legal thinking and strategy"); Durham v. United States Postal Serv., No. 91-2234, slip op. at 3 (D.D.C. Nov. 25, 1992) (release of investigative memoranda, witness files and electronic surveillance material would substantially interfere with pending homicide investigation by impeding government's ability to prosecute its strongest case); Starkey v. IRS, No. C91-20040, slip op. at 6-7 (C.D. Cal. Dec. 6, 1991) (release would reveal evidence and impair government's ability to present its best case). But see LeMaine v. IRS, slip op. at 11 (agency failed to demonstrate that release would "seriously impair any ongoing effort to collect taxes or penalties . . . or to pursue criminal charges").

[37] See, e.g., Dickerson v. Department of Justice, 992 F.2d at 1429 (public disclosure of information in Hoffa kidnapping file could reasonably be expected to interfere with enforcement proceedings); Church of Scientology Int'l v. IRS, No. 91-1025, slip op. at 10 (C.D. Cal. Aug. 26, 1993) (release of documents likely to interfere with IRS's ability to investigate requester pursuant to Church Audit Procedures Act); Atkin v. EEOC, No. 91-2508, slip op. at 37 (D.N.J. June 24, 1993) (disclosure of information provided by EEOC to FBI would interfere with investigation); Church of Scientology v. IRS, 816 F. Supp. at 1157 (disclosure could reasonably be expected to interfere with enforcement proceedings, subject IRS employees to harassment or reprisal and reveal direction and scope of IRS investigation); Dusenberry v. FBI, No. 91-0665, slip op. at 4 (D.D.C. May 5, 1992) (disclosure would compromise ongoing law enforcement investigations); Computer Professionals for Social Responsibility v. United States Secret Serv., No. 91-248, transcript at 8 (D.D.C. Mar. 12, 1992) (bench order) (disclosure would interfere with enforcement proceedings by revealing "total package of the government's approach" in ongoing investigation) (appeal pending); May v. IRS, No. 90-1123-W-2, slip op. at 7 (W.D. Mo. Dec. 9, 1991) (release of third-party correspondence, witness statements, worksheets, and travel vouchers would interfere with pending law enforcement actions); Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, No. 89-707, slip op. at 9 (C.D. Cal. Sept. 10, 1991) (disclosure would impede ongoing investigation); National Pub. Radio v. Bell, 431 F. Supp. at 514-15 (disclosure would impair continued, long-term investigation into suspicious
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Robbins Tire, the Supreme Court found that the NLRB had established interference with its unfair labor practice enforcement proceeding by showing that release of its witness statements would create a great potential for witness intimidation and could deter their cooperation.[38] Other courts have ruled that interference has been established where, for example, the disclosure of information could prevent the government from obtaining data in the future.[39] Indeed, the D.C. Circuit in Alyeska Pipeline Service Co. v. EPA ruled that disclosure of documents that might identify which of the requester's employees had provided those documents to a private party (who in turn had provided them to EPA) would "thereby subject them to potential reprisals and deter them from providing further information to [the] EPA."[40]

The exemption has been held to be properly invoked when release would hinder an agency's ability to control or shape investigations,[41] would enable targets of investigations to elude detection[42] or suppress or fabricate evi-

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[37](...continued)
death of nuclear-safety whistleblower). But see also Wrenn v. Kemp, No. 91-5383, slip op. at 1-2 (D.C. Cir. Dec. 2, 1992) (agency failed to explain its reasons for withholding and failed to demonstrate how disclosure could reasonably be expected to interfere with enforcement investigation).

[38] 437 U.S. at 239.

[39] See, e.g., Manna v. United States Dep't of Justice, 815 F. Supp. at 808 (disclosure of FBI reports could result in chilling effect on potential witnesses); Crowell & Moring v. DOD, 703 F. Supp. 1004, 1011 (D.D.C. 1989) (disclosure of identities of witnesses would impair grand jury's ability to obtain cooperation and would impede government's preparation of its case); Gould Inc. v. GSA, 688 F. Supp. at 703 (disclosure of information would have chilling effect on sources who are employees of requester); Nishnic v. United States Dep't of Justice, 671 F. Supp. 776, 794 (D.D.C. 1987) (disclosure of identity of foreign source would end its ability to provide information in unrelated ongoing law enforcement activities); Timken Co. v. United States Customs Serv., 531 F. Supp. at 199-200 (Disclosure of investigation records would cause interference with agency's ability "in the future to obtain this kind of information.").

[40] 856 F.2d at 311. But cf. Clyde v. United States Dep't of Labor, No. 85-139, slip op. at 6 (D. Ariz. July 3, 1986) (possible reluctance of contractors to enter into voluntary conciliations with government if substance of negotiations released does not constitute open law enforcement proceeding when specific conciliation process has ended); Cohen v. EPA, 575 F. Supp. 425, 428-29 (D.D.C. 1983) (Exemption 7(A) held inapplicable to protect letters sent to entities suspected of unlawfully releasing hazardous substances; disclosure not shown to deter parties from cooperating with voluntary cleanup programs).

[41] See, e.g., J.P. Stevens & Co. v. Perry, 710 F.2d 136, 143 (4th Cir. 1983).

[42] See, e.g., Moorefield v. United States Secret Serv., 611 F.2d at 1026.

dence,[43] or would prematurely reveal evidence or strategy in the government's case.[44] Exemption 7(A) protection also has been extended to circumstances involving prospective new trials where "[k]nowledge of potential witnesses and documentary evidence that were not used during the first trial would allow the plaintiff to inhibit further investigation, destroy undiscovered evidence, intimidate witnesses, and fabricate evidence."[45] Additionally, information that would reveal investigative trends, emphasis, and targeting schemes has been determined to be eligible for protection under Exemption 7(A) where disclosure would provide targets with the ability to perform a "cost/ benefit analysis" of compliance with agency regulations.[46]

Still other courts have indicated that any premature disclosure, by and of itself, can constitute interference with an enforcement proceeding.[47] In contrast, the D.C. Circuit has held that the mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that

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[43] See, e.g., Mapother v. Department of Justice, slip op. at 18 (release of prosecutor's index of all documents he deems relevant would afford a "virtual roadmap through the [government's] evidence . . . which would provide critical insights into its legal thinking and strategy"); Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 312; Nishnic v. United States Dep't of Justice, 671 F. Supp. at 794; Vosburgh v. IRS, No. 87-1179, slip op. at 5 (D. Kan. Nov. 24, 1987).

[44] See, e.g., Africa Fund v. Mosbacher, slip op. at 11 (disclosure "risks alerting targets to the existence and nature" of investigation); Manna v. United States Dep't of Justice, 815 F. Supp. at 808 (disclosure would obstruct justice by revealing agency's strategy and extent of its knowledge); Starkey v. IRS, slip op. at 6-7 (release of internal memoranda "would reveal evidence and impair [government's] ability to present its best case"); Lyons v. OSHA, No. 88-1562-T, slip op. at 3 (D. Mass. Dec. 2, 1991) (release would interfere with law enforcement proceedings); Raytheon Co. v. Department of the Navy, 731 F. Supp. 1097, 1101 (D.D.C. 1989) (information "could be particularly valuable to [target] in the event of settlement negotiations"); Ehringhaus v. FTC, 525 F. Supp. at 22-23.

[45] Helmsley v. United States Dep't of Justice, slip op. at 10; see also Neill v. United States Dep't of Justice, slip op. at 5 (where requester was granted new trial, release of information "could reasonably be expected to harm the pending proceeding through the circumvention of investigative leads, destruction of evidence, or intimidation of witnesses").

[46] Concrete Constr. Co. v. United States Dep't of Labor, slip op. at 3-5 (disclosure of past fiscal year's Field Operation Program Plans, containing projections for inspections and areas of concentration, would be "obviously a detriment to the enforcement objectives of the Department of Labor"); see also Farmworkers Legal Servs. v. United States Dep't of Labor, 639 F. Supp. 1368, 1374 (E.D.N.C. 1986) (Exemption 7(A) applicable to information pertaining to agency's "targeting scheme," disclosure of which "would 'reveal the amount of investigative resources targeted and allocated'" for inspections).

[47] See Lewis v. IRS, 823 F.2d at 378-79, 380; Barney v. IRS, 618 F.2d at 1273; Steinberg v. IRS, 463 F. Supp. 1272, 1273 (S.D. Fla. 1979).

were ruled unavailable "through discovery, or at least before [they] could obtain them through discovery," is insufficient alone to "constitute interference with a law enforcement proceeding."[48]

Exemption 7(A) ordinarily will not afford protection where the target of the investigation has possession of or submitted the information in question.[49] Nevertheless, it is now increasingly clear that courts will protect such material if an agency can demonstrate that its "selectivity of recording" information provided by the target would suggest the nature and scope of the investigation,[50] or if it can articulate with specificity how each category of documents, if disclosed, would cause interference.[51]

Thus far, only relatively few cases have been decided addressing the statutory changes in the language of Exemption 7(A) since the enactment of the FOIA Reform Act. No Exemption 7(A) decision to date has dispositively based its holding on the new language, but several decisions recognize that the change in the language of this exemption effectively broadens its protection.[52]

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[48] North v. Walsh, 881 F.2d at 1097; cf. Senate of P.R. v. United States Dep't of Justice, 823 F.2d at 579, 589 (trial court's failure to describe harm from release of undescribed documents developed for closed law enforcement investigation but allegedly relevant to open criminal law enforcement proceeding did not permit upholding Exemption 7(A) applicability).

[49] See, e.g., Wright v. OSHA, 822 F.2d at 646; Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986); Campbell v. HHS, 682 F.2d at 262.

[50] Willard v. IRS, 776 F.2d 100, 103 (4th Cir. 1985); Gould Inc. v. GSA, 688 F. Supp. at 704 n.37; Brinkerhoff v. Montoya, 3 Gov't Disclosure Serv. (P-H) at 83,055.

[51] See Campbell v. HHS, 682 F.2d at 265; Linsteadt v. IRS, 729 F.2d 998, 1004-05 (5th Cir. 1984); Doe v. United States Dep't of Justice, No. 86-1050, slip op. at 5-6 (D.D.C. Sept. 4, 1987) ("defendant must recite with particularity how revelation of the requested information will interfere with enforcement proceedings"); cf. Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 314 (mere assertions that requester knows scope of investigation not sufficient to present genuine issue of material fact that would preclude summary judgment).

[52] See Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d at 311 n.18 (improper reliance of lower court on pre-amendment version of Exemption 7(A) irrelevant as it simply "required EPA to meet a higher standard than FOIA now demands"); Curran v. Department of Justice, 813 F.2d at 474 n.1 ("the drift of the changes is to ease--rather than to increase--the government's burden in respect to Exemption 7(A)"); Gould Inc. v. GSA, 688 F. Supp. at 703 n.33 (The "1986 amendments relaxed the standard of demonstrating interference with enforcement proceedings."); Korkala v. United States Dep't of Justice, No. 86-242, slip op. at 6 n.* (D.D.C. July 31, 1987); see also Wright v. OSHA, 822 F.2d at 647; Spannaus v. United States Dep't of Justice, 813 F.2d at 1289; cf. John Doe Agency v. John Doe Corp., 493 U.S. 146, 157 (1989) (Court takes "practical approach" when confronted with interpretation of FOIA and applies

(continued...)

As a final Exemption 7(A)-related matter, agencies should be aware of the "(c)(1) exclusion,"[53] which was enacted by the FOIA Reform Act in 1986.[54] This special record exclusion applies to situations in which the very fact of a criminal investigation's existence is as yet unknown to the investigation's subject, and disclosure of the existence of the investigation (which would be revealed by any acknowledgment of the existence of responsive records) could reasonably be expected to interfere with enforcement proceedings. In such circumstances, an agency may treat the records as not subject to the requirements of the FOIA. (See discussion under Exclusions, below.)

EXEMPTION 7(B)

Exemption 7(B) of the FOIA, which is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."[1] Despite the possible constitutional significance of its function, in practice this exemption is rarely invoked. In the situation in which it would most logically be employed--i.e., an ongoing law enforcement proceeding--an agency's application of Exemption 7(A) to protect its institutional law enforcement interests invariably would serve to protect the interests of the defendants to the prosecution as well. Even in the non-law enforcement realm, the circumstances which call for singular reliance upon Exemption 7(B) occur only rarely.

Consequently, Exemption 7(B) has been featured prominently in only one case to date, Washington Post Co. v. United States Department of Justice.[2] At issue there was whether public disclosure of a pharmaceutical company's internal self-evaluative report, submitted to the Justice Department in connection with a grand jury investigation, would jeopardize the company's ability to receive a fair and impartial civil adjudication of several personal injury cases

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[52](...continued)
"workable balance" between interests of public in greater access and needs of government to protect certain kinds of information); United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 777-78 n.22 (1989) (Congress intended identical modification of language of Exemption 7(C) to provide greater "flexibility in responding to FOIA requests for law enforcement records" and replaced "a focus on the effect of a particular disclosure" with a "standard of reasonableness" which supports "categorical" approach to documents of similar character); Allen v. DOD, 658 F. Supp. 15, 23 (D.D.C. 1986) (parallel change of language of Exemption 7(C) created "broader protection" than available under former language).

[53] 5 U.S.C. § 552(c)(1) (1988).

[54] Pub. L. No. 99-570, § 1802, 100 Stat. at 3207-49; see Attorney General's Memorandum at 18-22.

[1] 5 U.S.C. § 552(b)(7)(B) (1988).

[2] 863 F.2d 96, 101-02 (D.C. Cir. 1988).

pending against it.[3] In remanding the case for further consideration, the Court of Appeals for the District of Columbia Circuit articulated a two-part standard to be employed in determining Exemption 7(B)'s applicability: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings."[4] Although the D.C. Circuit in Washington Post offered a single example of proper Exemption 7(B) applicability--i.e., where "disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties"--it did not limit the scope of the exemption to privileged documents only.[5]

EXEMPTION 7(C)

Exemption 7(C) provides protection for personal information in law enforcement records. This exemption is the law enforcement counterpart to Exemption 6, providing protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[1] Despite their similarities in language, though, the sweep of the two exemptions can be significantly different. (See discussion of Exemption 6, above.)

Whereas Exemption 6 routinely requires an identification and balancing of the relevant privacy and public interests, Exemption 7(C) can be even more "categorized" in its application. Indeed, the Court of Appeals for the District of Columbia Circuit recently held in SafeCard Services, Inc. v. SEC[2] that, based upon the traditional recognition of the strong privacy interests inherent in law enforcement records and the logical ramifications of United States Department of Justice v. Reporters Committee for Freedom of the Press,[3] the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).[4] (See discussion of Reporters Committee under Exemption 6, above.)

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[3] Id. at 99.

[4] Id. at 102.

[5] Id.

[1] 5 U.S.C. § 552(b)(7)(C) (1988).

[2] 926 F.2d 1197 (D.C. Cir. 1991).

[3] 489 U.S. 749 (1989); see also FOIA Update, Spring 1989, at 3-7 (discussing mechanics of privacy-protection decisionmaking process employed under Exemptions 6 and 7(C) alike).

[4] 926 F.2d at 1206; see, e.g., Grove v. Department of Justice, 802 F. Supp. 506, 511 (D.D.C. 1992) (information concerning criminal investigations of private citizens held categorically exempt).

At the outset, certain distinctions between Exemption 6 and Exemption 7(C) are apparent. In contrast with Exemption 6, Exemption 7(C)'s language establishes a lesser burden of proof to justify withholding in two distinct respects. It is well established that the omission of the word "clearly" from the language of Exemption 7(C) eases the burden of the agency and stems from the recognition that law enforcement records are inherently more invasive of privacy than "personnel and medical files and similar files."[5] Indeed, the "'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity'" has been repeatedly recognized.[6]

Additionally, the Freedom of Information Reform Act of 1986 has further broadened the protection afforded by Exemption 7(C) by lowering the risk-of-harm standard from "would" to "could reasonably be expected to."[7] The result of this amendment to the Act is an easing of the standard for evaluating a threatened privacy invasion through disclosure of law enforcement records.[8] One court, in interpreting the amended language, has pointedly observed that it affords the agency "greater latitude in protecting privacy interests" in the law enforcement context.[9] Such information "is now evaluated by the agency under a more elastic standard; exemption 7(C) is now more comprehensive."[10]

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[5] See Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977) ("[A]n individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo."); see also, e.g., Iglesias v. CIA, 525 F. Supp. 547, 562 (D.D.C. 1981).

[6] Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Stern v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984)); see also Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992) (association of FBI "agent's name with allegations of sexual and professional misconduct could cause the agent great personal and professional embarrassment"); Dunkelberger v. Department of Justice, 906 F.2d 779, 781 (D.C. Cir. 1990) (refusing to confirm or deny existence of letter of reprimand or suspension of named FBI agent).

[7] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-12 (Dec. 1987) [hereinafter Attorney General's Memorandum].

[8] Reporters Committee, 489 U.S. at 756 n.9; Stone v. FBI, 727 F. Supp. 662, 665 (D.D.C. 1990) (1986 FOIA amendments have "eased the burden of an agency claiming that exemption"), aff'd, No. 90-5065 (D.C. Cir. Sept. 14, 1990); Allen v. DOD, 658 F. Supp. 15, 23 (D.D.C. 1986).

[9] Washington Post Co. v. United States Dep't of Justice, No. 84-3581, slip op. at 31 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

[10] Id.; see also Keys v. United States Dep't of Justice, 830 F.2d 337, 346 (D.C. Cir. 1987) (at least after 1986 FOIA amendments, "government need not

(continued...)

EXEMPTION 7(C)

Under the balancing test that traditionally has been applied to both Exemption 6 and Exemption 7(C), the agency must first identify and evaluate the privacy interests, if any, implicated in the requested records.[11] But in the case of records related to investigations by criminal law enforcement agencies, the case law has long recognized, either expressly or implicitly, that "'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'"[12] Thus, Exemption 7(C) has been regularly applied to withhold references to persons who were of "investigatory interest" to a criminal law enforcement agency; indeed, the Supreme Court in Reporters Committee placed strong emphasis on such protection.[13]

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[10](...continued)
'prove to a certainty that release will lead to an unwarranted invasion of personal privacy'" (quoting Reporters Committee, 816 F.2d 730, 738 (D.C. Cir. 1987)), rev'd on other grounds, 489 U.S. 749 (1989); Nishnic v. Department of Justice, 671 F. Supp. 776, 788 (D.D.C. 1987) (holding phrase "could reasonably be expected to" to be more easily satisfied standard than "likely to materialize").

[11] See Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851, 855 (D.D.C. 1989) ("Our preliminary inquiry is whether a personal privacy interest is involved."); FOIA Update, Spring 1989, at 7.

[12] Fitzgibbon v. CIA, 911 F.2d at 767 (quoting Branch v. FBI, 658 F. Supp. 204, 209 (D.D.C. 1987)); see also Massey v. FBI, No. 92-6086, slip op. 5667, 5675 (2d Cir. Aug. 27, 1993) (same) (to be published); Miller v. Bell, 661 F.2d 623, 631-32 (7th Cir. 1981) ("real potential for harassment"), cert. denied, 456 U.S. 960 (1982); Lesar v. United States Dep't of Justice, 636 F.2d 472, 488 (D.C. Cir. 1980) ("'It is difficult if not impossible, to anticipate all respects in which disclosure might damage reputation or lead to personal embarrassment or discomfort.'" (quoting Lesar v. United States Dep't of Justice, 455 F. Supp. 921, 925 (D.D.C. 1978))); Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (deletion of references to third parties "to minimize the public exposure or possible harassment"); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (disclosure of identities of individuals excludable from U.S. "would result in derogatory inferences about and possible embarrassment to those individuals"); Stauss v. IRS, 516 F. Supp. 1218, 1222 n.7 (D.D.C. 1981) (disclosure could chill tax protestors' lawful expression of disagreement with tax policies); cf. Cerveny v. CIA, 445 F. Supp. 772, 776 (D. Colo. 1978) (mere mention of individual's name as subject of CIA file could be damaging to his or her reputation) (Exemption 6).

[13] See 489 U.S. at 779; see also, e.g., Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993) ("potential for harassment, reprisal or embarrassment" if names of individuals investigated by FBI disclosed); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992) ("embarrassment and reputational harm" would result from disclosure of taped conversations of individuals with boss of New Orleans organized crime family); Silets v. United States Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) (protection of associates of Jimmy Hoffa who were subject to electronic surveillance), cert.
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Hence, the small minority of older federal district court decisions that failed to appreciate the strong privacy interests inherent in the association of an individual with a law enforcement investigation should no longer be regarded as authoritative.[14]

The identities of federal, state and local law enforcement personnel referenced in investigatory files are also routinely withheld, usually for reasons similar to those described quite aptly by the Court of Appeals for the Fourth Circuit:

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.[15]

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[13](...continued)
denied, 112 S. Ct. 2991 (1992); Antonelli v. FBI, 721 F.2d 615, 618 (7th Cir. 1983) ("revealing that a third party has been the subject of FBI investigations is likely to constitute an invasion of [personal privacy]"), cert. denied, 467 U.S. 1210 (1984); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 861-66 (D.C. Cir. 1981) (identities of those investigated but not charged must be withheld unless "exceptional interests militate in favor of disclosure"); Baez v. United States Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980) ("There can be no clearer example of an unwarranted invasion of privacy than to release to the public that another individual was the subject of an FBI investigation."); Maroscia v. Levi, 569 F.2d at 1002; Heller v. United States Marshals Serv., 655 F. Supp. 1088, 1090 (D.D.C. 1987) (federal employees "have a strong [privacy] interest in not being associated unwarrantedly with alleged criminal activity"); Rushford v. Civiletti, 485 F. Supp. 477, 479 (D.D.C. 1980) ("severe adverse impact upon both his personal life and his official performance"), aff'd sub nom. Rushford v. Smith, 656 F.2d 900 (D.C. Cir. 1981) (table cite).

[14] See Silets v. FBI, 591 F. Supp. 490, 498 (N.D. Ill. 1984); Cunningham v. FBI, 540 F. Supp. 1, 2 (N.D. Ohio 1981), rev'd & remanded with order to vacate, No. 84-3367, slip op. at 3 (6th Cir. May 9, 1985); Lamont v. Department of Justice, 475 F. Supp. 761, 778 (S.D.N.Y. 1979).

[15] Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978). See FOIA Update, Spring 1984, at 5; see also Massey v. FBI, slip op. at 5674-75 (disclosure of names of FBI agents and other law enforcement personnel "could subject them to embarrassment and harassment"); Church of Scientology Int'l v. IRS, 995 F.2d 916, 920-21 (9th Cir. 1993) (privacy interest exists in handwriting of IRS agents in official documents); Maynard v. CIA, 986 F.2d at 566 (names and initials of low-level FBI agents and support personnel protectible); Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (FBI employees have substantial privacy interest in concealing their identities), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993);
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EXEMPTION 7(C)

It should be noted that prior to the Reporters Committee and SafeCard Services decisions, courts ordinarily held that because Exemption 7(C) involves a balancing of the private and public interests on a case-by-case basis, there existed no "blanket exemption for the names of all [law enforcement] personnel in all documents."[16] Nonetheless, absent proven, significant misconduct on the parts of investigators, the overwhelming majority of courts have held the identities of law enforcement personnel exempt pursuant to Exemption 7(C).[17]

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[15](...continued)
In re Wade, 969 F.2d 241, 246 (7th Cir. 1992) (risk of "annoyance and harassment" of FBI agent); Davis v. United States Dep't of Justice, 968 F.2d at 1281 ("undercover agents" held to have protectible privacy interests); Johnson v. United States Dep't of Justice, 739 F.2d 1514, 1518-19 (10th Cir. 1984) (quoting with approval Nix v. United States, 572 F.2d at 1006); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir. 1984) (Inspector General investigator has "interest in retaining the capability to perform his tasks effectively by avoiding untoward annoyance or harassment"); Miller v. Bell, 661 F.2d at 630 ("It is not necessary that harassment rise to the level of endangering physical safety before the protections of 7(C) can be invoked."); Lesar v. United States Dep't of Justice, 636 F.2d at 487-88 (annoyance or harassment); Maroscia v. Levi, 569 F.2d at 1002; Church of Scientology v. IRS, 816 F. Supp. 1138, 1160 (W.D. Tex. 1993) (disclosure of identifying information and handwriting could subject IRS employees to "harassment and annoyance") (appeal pending); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 809 (D.N.J. 1993) (because La Cosa Nostra is so violent and retaliatory, names of law enforcement personnel must be safeguarded); Church of Scientology v. IRS, No. 90-11069, slip op. at 26-28 (D. Mass. Apr. 22, 1992) (magistrate's recommendation) (because IRS and Scientologists have long history of confrontation, IRS properly withheld identifying information, including handwriting of employees); Author Servs., Inc. v. IRS, No. 90-2187, slip op. at 7 (C.D. Cal. Nov. 14, 1991) (same); Malizia v. United States Dep't of Justice, 519 F. Supp. 338, 348-49 (S.D.N.Y. 1981) (protection against retaliation).

[16] Lesar v. United States Dep't of Justice, 636 F.2d at 487; see, e.g., Stern v. FBI, 737 F.2d at 94 (name of high-level FBI employee who directly participated in intentional wrongdoing ordered released; names of two mid-level employees whose negligence incidentally furthered cover-up held protectible).

[17] See, e.g., Hale v. United States Dep't of Justice, 973 F.2d at 901 (unsubstantiated allegations of government wrongdoing do not justify disclosing law enforcement personnel names); Davis v. United States Dep't of Justice, 968 F.2d at 1281 ("undercover agents"); In re Wade, 969 F.2d at 246 (FBI agent); Patterson v. FBI, 893 F.2d 595, 601 (3d Cir.), cert. denied, 498 U.S. 812 (1990); Doherty v. United States Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985) ("Identities of FBI agents, of FBI non-agent personnel [and] of employees of the Immigration and Naturalization Service are embraced by exemption (b)(7)(C)."); Johnson v. United States Dep't of Justice, 739 F.2d at 1519 (FBI agents' identities found properly protectible absent evidence in record of impropriety); Manchester v. DEA, 823 F. Supp. 1259, 1271 (E.D. Pa. 1993) (agents' names protected despite plaintiff's sweeping allegations of govern-
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The few aberrational decisions ordering disclosure of the names of government investigators--other than where proven misconduct has been involved--all preceded Reporters Committee and contain no persuasive reasoning contrary to the overwhelming majority of decisions on this issue.[18]

The history of one case in the District Court for the District of Columbia illustrates the impact of the Reporters Committee decision in this area of law. In Southam News v. INS,[19] the district court initially held that the identities of FBI clerical personnel who performed administrative tasks with respect to requested records could not be withheld under Exemption 7(C). Even then, this position was inconsistent with other, contemporaneous decisions.[20] Following the Supreme Court's decision in Reporters Committee, the government sought reconsideration of the Southam News decision. Agreeing that revelation of identities and activities of low-level agency personnel ordinarily will shed no light on government operations, as required by Reporters Committee, the district court reversed its earlier disclosure order and held the names to be properly protected.[21] Significantly, the court also recognized that "the only imaginable contribution that this information could make would be to enable the public to seek out individuals who had been tangentially involved in investigations and to question them for unauthorized access to information as to what the investi-

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[17](...continued)
mental misconduct); Ray v. United States Dep't of Justice, 778 F. Supp. 1212, 1215 (S.D. Fla. 1991) (government may neither confirm nor deny existence of records concerning results of INS investigation of alleged misconduct of employee); Heller v. United States Marshals Serv., 655 F. Supp. at 1090-91 (identities of federal marshals held protectible where there was "virtually no wrongdoing" on their parts).

[18] See, e.g., Castaneda v. United States, 757 F.2d 1010, 1012 (9th Cir.) (holding USDA investigator's privacy interest "not great" and noting that his "name would be discoverable in any civil case brought [against the agency]"), amended upon denial of panel reh'g, 773 F.2d 251 (9th Cir. 1985); Iglesias v. CIA, 525 F. Supp. at 563 (names of government employees involved in conducting investigation ordered disclosed); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 904 (D.D.C. 1980) (names of SEC investigators ordered disclosed).

[19] 674 F. Supp. at 888.

[20] See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d at 52 (identities of FBI agents and FBI nonagent personnel protected); Kirk v. United States Dep't of Justice, 704 F. Supp. 288, 292 (D.D.C. 1989) ("Just like FBI agents, administrative and clerical personnel could be subject to harassment, questioning, and publicity, and the Court concludes that the FBI did not need to separate the groups of employees for purposes of explaining why disclosure of their identities was opposed.").

[21] Southam News v. INS, No. 85-2721, slip op. at 3 (D.D.C. Aug. 30, 1989).

gation entailed and what other FBI personnel were involved."[22] More recently, after undertaking a post-Reporters Committee analysis, the same district court strongly reaffirmed that identities of both FBI clerical personnel and low-level special agents are properly withheld as a routine matter under Exemption 7(C), even when they take part in a highly publicized investigation.[23]

Traditionally, it has been held that Exemption 7(C) cannot be invoked to shield the fact that a third party has been investigated once the agency has publicly confirmed the existence of such an investigation, because there is little or no privacy interest in such public-record information.[24] However, in Reporters Committee, the Supreme Court found that substantial privacy interests can exist in personal information such as is contained in "rap sheets," even though the information has been made available to the general public at some place and point in time. Applying a "practical obscurity" standard,[25] the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to [them]."[26]

All courts of appeals to have addressed the issue have found protectible privacy interests--in conjunction with or in lieu of protection under Exemption 7(D)--in the identities of individuals who provide information to law enforce-

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[22] Id.; see also Manna v. United States Dep't of Justice, 815 F. Supp. at 809 (names of law enforcement personnel involved in La Cosa Nostra investigation); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 19 (D.D.C. 1990) (identities of FBI agents and other government personnel involved in processing FOIA request), aff'd, 980 F.2d 782 (D.C. Cir. 1992).

[23] See Stone v. FBI, 727 F. Supp. at 663 n.1 (protecting identities of FBI special agents and FBI clerical employees who participated in investigation of assassination of Robert F. Kennedy).

[24] See, e.g., Rizzo v. United States Dep't of Justice, No. 84-2080, slip op. at 5-6 (D.D.C. Feb. 28, 1985) (facts elicited at public trial are matters of public knowledge); Tennessean Newspapers, Inc. v. Levi, 403 F. Supp. 1318, 1320-21 (M.D. Tenn. 1975) (identities of individuals recently arrested or indicted ordered disclosed); see also Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 572 (6th Cir. 1986) (information relating to job performance that "had been fully explored in public proceedings" not exempt); Myers v. United States Dep't of Justice, No. 85-1746, slip op. at 5 (D.D.C. Sept. 22, 1986) (matters discussed in trial testimony of law enforcement officials not exempt). (See Exemption 7(D), below, for a discussion of the status of open-court testimony under that exemption.) But see Kimberlin v. Department of the Treasury, 774 F.2d 204, 209 (7th Cir. 1985) (Exemption 7(C) held applicable to third party's driver's license and passport "which were introduced into evidence" in federal criminal trial).

[25] 489 U.S. at 762-63, 780.

[26] Id. at 764.

ment agencies.[27] Consequently, the names of witnesses, their home and business addresses, and their telephone numbers have been held properly protectible under Exemption 7(C).[28] Additionally, protection has been afforded to the

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[27] See, e.g., Massey v. FBI, slip op. at 5674-75 (disclosure of names of cooperating witnesses and third parties, including cooperating law enforcement officials, could subject them to "embarrassment and harassment"); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (withholding interviewees' names as "necessary to avoid harassment and embarrassment"); Cleary v. FBI, 811 F.2d 421, 424 (8th Cir. 1987) (disclosure would subject "sources to unnecessary questioning concerning the investigation [and] to subpoenas issued by private litigants in civil suits incidentally related to the investigation"); Cuccaro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) ("privacy interest of . . . witnesses who participated in OSHA's investigation outweighs public interest in disclosure"); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (disclosure of identities of employee-witnesses in OSHA investigation could cause "problems at their jobs and with their livelihoods"); New England Apple Council v. Donovan, 725 F.2d at 144-45 ("Disclosure could have a significant, adverse effect on this individual's private or professional life."); Kiraly v. FBI, 728 F.2d 273, 278-80 (6th Cir. 1984); Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564-65 (D.C. Cir. 1982) (concurring opinion) ("risk of harassment" and fear of reprisals); Alirez v. NLRB, 676 F.2d 423, 427 (10th Cir. 1982) (disclosure would result in "embarrassment or reprisals"); Lesar v. United States Dep't of Justice, 636 F.2d at 488 ("'Those cooperating with law enforcement should not now pay the price of full disclosure of personal details.'") (quoting Lesar v. United States Dep't of Justice, 455 F. Supp. at 925); Scherer v. Kelley, 584 F.2d 170, 176 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979); Maroscia v. Levi, 569 F.2d at 1002.

[28] See L&C Marine Transp., Ltd. v. United States, 740 F.2d at 922 ("employee-witnesses . . . have a substantial privacy interest"); Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) ("[The requester] has mentioned no legitimate need for the witnesses' phone numbers and we can well imagine the invasions of privacy that would result should he obtain them."); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 10 (D. Colo. Mar. 22, 1993) (release of documents would subject witnesses to a reasonable likelihood of harassment and embarrassment); Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 3-4 (D.D.C. Mar. 12, 1993) (identities of witnesses who assisted in preparation of environmental report protectible); Manna v. United States Dep't of Justice, 815 F. Supp. at 809 (names of witnesses in La Cosa Nostra case safeguarded); Farese v. United States Dep't of Justice, 683 F. Supp. 273, 275 (D.D.C. 1987) (names and number of family members of participants in Witness Security Program, as well as funds authorized to each, held exempt because disclosure "would pose a possible danger to the persons named" or "might subject those persons to harassment"); United States Steel Corp. v. United States Dep't of Labor, 558 F. Supp. 80, 82-83 (W.D. Pa. 1983) (names, addresses and phone numbers of witnesses found exempt); Friedman v. FBI, 605 F. Supp. 306, 321 (N.D. Ga. 1981) ("names and other unique personal information" about witnesses held exempt); see also Harper v. United

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identities of informants,[29] even where it was shown that "the information provided to law enforcement authorities was knowingly false."[30]

Although on occasion a pre-Reporters Committee decision found that an individual's testimony at trial precluded Exemption 7(C) protection,[31] under the Reporters Committee "practical obscurity" standard, trial testimony should not ordinarily diminish Exemption 7(C) protection.[32] Plainly, if a person who

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[28](...continued)
States Dep't of Justice, No. 86-5489, slip op. at 3 (D.C. Cir. Sept. 22, 1987) (names of potential witnesses held exempt); Kilroy v. NLRB, 633 F. Supp. 136, 145 (S.D. Ohio 1985) (names and telephone numbers of persons who provided affidavits held exempt), aff'd, 823 F.2d 553 (6th Cir. 1987) (table cite); cf. Brown v. FBI, 658 F.2d 71, 75-76 (2d Cir. 1981) (information concerning witness who testified against requester protected under Exemption 6). But see Ferri v. Bell, 645 F.2d 1213, 1218 (3d Cir. 1981) (public interest in "Brady material" concerning possible "deal" between witness and prosecution outweighs witness' privacy interests).

[29] Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1490 (11th Cir. 1992) ("Disclosure of the identities of the FBI's sources will disclose a great deal about those sources but in this case will disclose virtually nothing about the conduct of the government."); Canning v. United States Dep't of the Treasury, No. 91-2324, slip op. at 6 (D.D.C. Apr. 28, 1993) (information that would identify individuals who cooperated with law enforcement agency is protectible); Manna v. United States Dep't of Justice, 815 F. Supp. at 809 (because organization so retaliatory, names of informants in La Cosa Nostra case safeguarded); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 793 (D.D.C. 1992) (identities of third parties who provided information to agency properly withheld), summary affirmance granted in pertinent part, No. 92-5360 (D.C. Cir. Apr. 29, 1993); Johnson v. United States Dep't of Justice, No. 85-714, slip op. at 3 (D.D.C. Nov. 13, 1991) (requester's interest in overturning his conviction does not outweigh substantial privacy interests of informants).

[30] Gabrielli v. United States Dep't of Justice, 594 F. Supp. 309, 313 (N.D.N.Y. 1984); see also Block v. FBI, No. 83-813, slip op. at 11 (D.D.C. Nov. 19, 1984) ("[Requester's] personal interest in knowing who wrote letters concerning him . . . is not sufficient to demonstrate a public interest.") (Exemption 6).

[31] Compare Myers v. United States Dep't of Justice, slip op. at 3-6 ("no privacy interest exists" as to names of law enforcement personnel who testified at requester's trial) with Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 6 (D.D.C. Apr. 13, 1989) ("[T]he protection of Exemption 7(C) is not waived by the act of testifying at trial."), summary affirmance granted, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

[32] See Burge v. Eastburn, 934 F.2d 577, 579 (5th Cir. 1991) (affirming refusal, under Exemption 7(C), to confirm or deny existence of information in FBI files regarding individuals who testified at plaintiff's murder trial); Engelking v. DEA, No. 91-0165, slip op. at 7-8 (D.D.C. Nov. 30, 1992) (even
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actually testifies retains a substantial privacy interest, the privacy of someone who is identified only as a potential witness likewise should be preserved.[33]

Moreover, courts have consistently recognized that the mere passage of time will not ordinarily diminish the applicability of Exemption 7(C).[34] This may be especially true in instances in which the information was obtained through questionable law enforcement investigations.[35] In fact, the "practical obscurity" concept expressly recognizes that the passage of time may increase the privacy interest at stake when disclosure would revive information that was

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[32](...continued)
though information sought is available in requester's trial transcript, Exemption 7(C) protects information about people who were implicated, involved, or were associated with requester); Jones v. FBI, No. C77-1001, slip op. at 13 (N.D. Ohio Aug. 12, 1992) ("fact that a person has given testimony at trial does not mean that person has waived his or her privacy for all purposes") (appeal pending); Curro v. United States Dep't of Justice, No. 90-1887, slip op. at 5 (D.D.C. Mar. 20, 1991) ("[W]itness[es] who testify at criminal trial do not forfeit their privacy interests, except, perhaps, as to the public testimony."); see also Pittman v. Phillips, No. 91-3146, slip op. at 2-4 (D.D.C. Oct. 8, 1992) (protecting names of law enforcement officers in audiotape recordings made of requester's plea-bargain negotiations with government agents).

[33] See Watson v. United States Dep't of Justice, 799 F. Supp. 193, 196 (D.D.C. 1992) (identities of potential witnesses protectible); Harvey v. United States Dep't of Justice, 747 F. Supp. 29, 37 (D.D.C. 1990).

[34] See, e.g., Maynard v. CIA, 986 F.2d at 566 n.21 (effect of passage of time upon individual's privacy interests found "simply irrelevant"); Fitzgibbon v. CIA, 911 F.2d at 768 (passage of more than 30 years irrelevant where records reveal nothing about government activities); Keys v. United States Dep't of Justice, 830 F.2d at 348 (passage of 40 years did not "dilute the privacy interest as to tip the balance the other way"); King v. United States Dep't of Justice, 830 F.2d 210, 234 (D.C. Cir. 1987) (rejecting argument that passage of time diminished privacy interests at stake in records more than 35 years old); Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983) ("the danger of disclosure may apply to old documents"), cert. denied, 465 U.S. 1004 (1984); Simon v. United States Dep't of Justice, 752 F. Supp. at 20 (The "passage of almost forty years does not so abate the privacy interests at stake in a controversial case of this kind."); Stone v. FBI, 727 F. Supp. at 664 (FBI agents who participated in an investigation over 20 years ago, even one as well known as RFK assassination, "have earned the right to be 'left alone' unless an important public interest outweighs that right."); Branch v. FBI, 658 F. Supp. at 209 (The "privacy interests of the persons mentioned in the investigatory files do not necessarily diminish with the passage of time.").

[35] See, e.g., Dunaway v. Webster, 519 F. Supp. 1059, 1079 (N.D. Cal. 1981) ("[The target of a McCarthy era investigation] may . . . deserve greater protection, because the connection to such an investigation might prove particularly embarrassing or damaging.").

once public knowledge but has long since faded from memory.[36]

An individual's Exemption 7(C) privacy interest is not extinguished merely because a requester might on his own be able to "piece together" the identities of third parties whose names have been deleted.[37] Nor do persons mentioned in law enforcement records lose all their rights to privacy merely because their names have been disclosed.[38] Similarly, "[t]he fact that one document does disclose some names . . . does not mean that the privacy rights of these or others are waived; [requesters] do not have the right to learn more about the activities and statements of persons merely because they are mentioned once in a public document about the investigation."[39]

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[36] See Reporters Committee, 489 U.S. at 767 ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may at one time have been public."); Rose v. Department of the Air Force, 495 F.2d 261, 267 (2d Cir. 1974) ("[A] person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information.") (Exemption 6), aff'd, 425 U.S. 352 (1976). But see Outlaw v. United States Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. Mar. 25, 1993) (agency must release 25-year-old photographs of murder victim with no known surviving next of kin; murder is "surely long forgotten by whatever public noticed it at the time"); Silets v. FBI, 591 F. Supp. at 498 ("[W]here documents are exceptionally old, it is likely that their age has diminished the privacy interests at stake."); Wilkinson v. FBI, 633 F. Supp. 336, 345 (C.D. Cal. 1986) ("'There is likely to be little fear of retaliation, humiliation, or embarrassment over twenty years after the events.'" (quoting Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984))).

[37] Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); see also L&C Marine Transp., Ltd. v. United States, 740 F.2d at 922 ("An individual does not lose his privacy interest under 7(C) because his identity . . . may be discovered through other means."); Larson v. Executive Office for United States Attorneys, No. 85-2575, slip op. at 5 n.6 (D.D.C. Nov. 22, 1988) ("[T]he fact that [the requester] might know the names of some agents and witnesses who testified against him [as he alleges] does not justify release of documents that may or may not contain similar information.").

[38] See, e.g., Hunt v. FBI, 972 F.2d at 288 ("public availability" of accused FBI agent's name does not defeat privacy protection and "would make redaction of [the agent's name in] the file a pointless exercise"); Fitzgibbon v. CIA, 911 F.2d at 768 (fact that CIA or FBI may have released information about individual elsewhere does not diminish that individual's "substantial privacy interests"); Engelking v. DEA, slip op. at 7-8 (even though information sought is available in requester's trial transcript, Exemption 7(C) protection remains). But see Grove v. CIA, 752 F. Supp. 28, 32 (D.D.C. 1990) (FBI must further explain Exemption 7(C) withholdings in light of highly publicized nature of investigation and fact that CIA and Secret Service released other records pertaining to same individuals).

[39] Kirk v. United States Dep't of Justice, 704 F. Supp. at 292.

Under the traditional Exemption 7(C) analysis, once a privacy interest had been identified and assessed, it is balanced against any public interest that would be served by disclosure.[40] And under Reporters Committee the standard of public interest to consider is one specifically limited to the FOIA's "core purpose" of "shed[ding] light on an agency's performance of its statutory duties."[41] Accordingly, for example, the courts have consistently refused to recognize any public interest, as defined by Reporters Committee, in disclosure of information to assist a convict in challenging his conviction.[42] Indeed, a

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[40] See Massey v. FBI, slip op. at 5676 (once agency establishes that privacy interest exists, that interest must be balanced against value of information in furthering FOIA's disclosure objectives); Church of Scientology Int'l v. IRS, 995 F.2d at 921 (case remanded where district court failed to determine whether public interest in disclosure outweighed privacy concerns); Keys v. United States Dep't of Justice, 830 F.2d at 346; Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 10 (D. Mass. Dec. 29, 1992) (public interest in disclosing amount of money government paid to officially confirmed informant guilty of criminal wrongdoing outweighs informant's de minimis privacy interest); Church of Scientology v. IRS, 816 F. Supp. at 1160 (while employees have privacy interest in their handwriting, that interest does not outweigh public interest in disclosure of information contained in documents not otherwise exempt; agency must, at requester's expense, transcribe and disclose documents not otherwise exempt); Harvey v. United States Dep't of Justice, 747 F. Supp. at 36; Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. at 855; see also FOIA Update, Spring 1989, at 7.

[41] 489 U.S. at 773.

[42] See, e.g., Hale v. United States Dep't of Justice, 973 F.2d at 901 (no FOIA-recognized public interest in death-row inmate's allegation of unfair trial); Landano v. United States Dep't of Justice, 956 F.2d 422, 430 (3d Cir. 1992) (no public interest in disclosure of identities of individuals involved in murder investigation because such release would not shed light on how FBI fulfills its responsibilities), cert. denied, 113 S. Ct. 197 (1992); Burge v. Eastburn, 934 F.2d at 580 ("requester's need, however significant, does not warrant disclosure"); Neill v. United States Dep't of Justice, No. 91-3319, slip op. at 5-6 (D.D.C. July 20, 1993) (Exemption 7(C) protects information notwithstanding claim that withholding identities of individuals involved in investigation of plaintiff would violate "Brady doctrine"); Durham v. United States Postal Serv., No. 91-2234, slip op. at 4-5 (D.D.C. Nov. 25, 1992) ("Glomar" response appropriate even though plaintiff argues information would prove his innocence), summary affirmance granted, No. 92-5511 (D.C. Cir. July 27, 1993); Johnson v. United States Dep't of Justice, slip op. at 3 (in absence of compelling evidence of agency misconduct, plaintiff's contention of "indirect public purpose"--collateral attack on his criminal conviction--does not outweigh substantial privacy interests of informants); Wagner v. FBI, No. 90-1314, slip op. at 6-7 (D.D.C. June 4, 1991) (public interest "is that of the public at large in investigating the actions of government agencies, not plaintiff's interest"), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); Curro v. United States Dep't of Justice, slip op. at 5 ("plaintiff cannot use the FOIA as a (continued...)

FOIA requester's private need for information in connection with litigation plays no part in whether disclosure is warranted.[43] Unsubstantiated allegations of official misconduct have been held insufficient to establish a public interest in disclosure.[44] Further, it has been held that no public interest exists in federal records that might reveal alleged misconduct by state officials;[45] such an attenuated interest "falls outside the ambit of the public interest the FOIA was enacted to serve."[46]

It is important to remember that a requester must do more than identify a public interest that qualifies for consideration under Reporters Committee. He or she must demonstrate that the public interest in disclosure is sufficiently

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[42](...continued)
substitute for criminal discovery"); Johnson v. United States Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality [under Exemptions 7(C) and 7(D)] is . . . outside the proper role of the FOIA. Exceptions cannot be made because of the subject matter or [death-row status] of the requester.").

[43] Massey v. FBI, slip op. at 5677 (mere possibility that information sought may aid individual in pursuit of litigation does not give rise to public interest); Andrews v. United States Dep't of Justice, 769 F. Supp. 314, 317 (E.D. Mo. 1991) (no public interest in satisfaction of private judgments); see also Johnson v. Federal Bureau of Prisons, No. CV-90-H-645-E, slip op. at 8 (N.D. Ala. Nov. 1, 1990) (citing L&C Marine Transp., Ltd. v. United States, 740 F.2d at 923); Joslin v. United States Dep't of Labor, No. 88-1999, slip op. at 8 (10th Cir. Oct. 20, 1989) (no public interest in release of documents sought for use in private tort litigation). But see Outlaw v. United States Dep't of the Army, 815 F. Supp. at 506 (agency must release 25-year-old photographs of murder victim; obvious public interest in disclosure as check on administration of justice).

[44] See, e.g., Beck v. Department of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir. 1993) (agency properly "Glomarized" request for records concerning alleged wrongdoing by two named employees; no public interest absent any evidence of wrongdoing); KTVY-TV v. United States, 919 F.2d at 1470 (allegations of "possible neglect"); Manchester v. DEA, 823 F. Supp. at 1271 (sweeping allegations of governmental misconduct); Wagner v. FBI, slip op. at 6-7 (allegations that agents conducted warrantless search of plaintiff's home). But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 567-69 (1st Cir. 1992) (aberrational finding of public interest in disclosure of unsubstantiated allegations against two senior officials); McCutchen v. HHS, No. 91-142, slip op. at 10-13 (D.D.C. Aug. 24, 1992) (refusing to protect identities of agency scientists found not to be engaged in alleged scientific misconduct) (Exemptions 6 and 7(C)) (appeal pending).

[45] Landano v. United States Dep't of Justice, 956 F.2d at 430 (There is "no FOIA-recognized public interest in discovering wrongdoing by a state agency.").

[46] Reporters Committee, 489 U.S. at 775; see also FOIA Update, Spring 1991, at 6 (explaining that "government activities" in Reporter's Committee standard means activities of federal government).

compelling to overcome legitimate privacy interests.[47] Of course, "[w]here the requester fails to assert a public interest purpose for disclosure, even a less than substantial invasion of another's privacy is unwarranted."[48] Moreover, it should be remembered that any special expertise claimed by the requester is irrelevant in assessing any public interest in disclosure.[49] In the wake of Reporters Committee, the public interest standard will ordinarily not be satisfied where FOIA requesters seek law enforcement information pertaining to living individuals.[50]

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[47] See Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (general interest of legislature in "getting to the bottom" of highly controversial investigation held not sufficient to overcome "substantial privacy interests"); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 59 (D.D.C. 1990) (public interest in alleged plot in United States by agents of now-deposed dictatorship held insufficient to overcome "strong privacy interests"); Stone v. FBI, 727 F. Supp. at 667-68 n.4 ("[N]ew information considered significant by zealous students of the RFK assassination investigation would be nothing more than minutia of little or no value in terms of the public interest."); Aleman v. Shapiro, No. 85-3313, slip op. at 5 (D.D.C. May 5, 1987) (plaintiff must assert sufficient public interest in disclosure to outweigh privacy interest of individuals mentioned in law enforcement files).

[48] King v. United States Dep't of Justice, 586 F. Supp. 286, 294 (D.D.C. 1983), aff'd, 830 F.2d 210 (D.C. Cir. 1987); see also Beck v. Department of Justice, 997 F.2d at 1494 (where request implicates no public interest at all, court "'need not linger over the balance; something . . . outweighs nothing every time'" (quoting National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990))) (Exemptions 6 and 7(C)); Fitzgibbon v. CIA, 911 F.2d at 768 (same); FOIA Update, Spring 1989, at 7.

[49] See Massey v. FBI, slip op. at 5677 (identity of requesting party and use that party plans to make of requested information "has no bearing" on assessment of public interest served by disclosure); Stone v. FBI, 727 F. Supp. at 668 n.4 (court looks to public interest served by release of information, "not to the highly specialized interests of those individuals who understandably have a greater personal stake in gaining access to that information").

[50] See, e.g., Maynard v. CIA, 986 F.2d at 566 (no public interest in disclosure of information concerning low-level FBI employees and third parties); Fitzgibbon v. CIA, 911 F.2d at 768 ("[T]here is no reasonably conceivable way in which the release of one individual's name . . . would allow citizens to know 'what their government is up to.'" (quoting Reporters Committee, 489 U.S. at 1481)); Stone v. FBI, 727 F. Supp. at 666-67 (no public interest in disclosure of identities of low-level FBI agents who participated in RFK assassination investigation); Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. at 855-56 (no public interest in disclosure of information DEA obtained about individuals and their activities, where such material would not shed light on DEA's conduct with respect to its investigation); see also KTVY-TV v. United States, 919 F.2d at 1470 (disclosure of identities of witnesses and

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In Reporters Committee, the Supreme Court emphasized the desirability of establishing "categorical balancing" under Exemption 7(C) as a means of achieving "workable rules" for processing FOIA requests.[51] In so doing, it recognized that entire categories of cases can properly receive uniform disposition "without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[52] This approach, in conjunction with other elements of Reporters Committee and traditional Exemption 7(C) principles, subsequently led the D.C. Circuit to largely eliminate the need for case-by-case balancing in favor of "categorical" withholding of individuals' identities in law enforcement records.[53]

In SafeCard Services, Inc. v. SEC, the plaintiff sought information pertaining to an SEC investigation of manipulation of SafeCard stock, including "names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the SEC."[54] Reiterating the fundamentally inherent privacy interest of individuals mentioned in any way in law enforcement files,[55] the D.C. Circuit found that the plaintiff's asserted public interest--providing the public "with insight into the SEC's conduct with respect to SafeCard"--was "not just less substantial [but] insubstantial."[56] Based upon the Supreme Court's endorsement of categorical rules in Reporters Committee, it then further determined that the identities of individuals who appear in law enforcement files would virtually never be "very probative of an agency's behavior or performance."[57] It observed that such information would serve a "significant" public interest only if "there is compelling evidence that the agency . . . is engaged in illegal activity."[58] Consequently, the D.C. Circuit held

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[50](...continued)
third parties would not further plaintiff's unsupported theory that post office shootings could have been prevented by postal authorities); Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989) ("[M]erely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure."); FOIA Update, Spring 1989, at 6.

[51] Reporters Committee, 489 U.S. at 776-80.

[52] Id. at 780.

[53] See SafeCard Servs., Inc. v. SEC, 926 F.2d at 1206.

[54] Id. at 1205.

[55] See id. (recognizing privacy of suspects, witnesses and investigators).

[56] Id.

[57] Id.

[58] Id. at 1206; cf. Dunkelberger v. Department of Justice, 906 F.2d at 782 (finding some cognizable public interest in "FBI agent's alleged participation in
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that "unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is [categorically] exempt from disclosure."[59]

Protecting the privacy interests of individuals who are the targets of FOIA requests and are named in investigatory records requires special procedures. Many agencies with criminal law enforcement responsibilities follow the approach of the FBI, which is to respond to FOIA requests for records concerning other individuals by refusing to confirm or deny whether such records exist. Such a response is necessary because, as previously discussed, members of the public may draw adverse inferences from the mere fact that an individual is mentioned in the files of a criminal law enforcement agency.[60]

Therefore, except where the third-party subject is deceased or provides a written waiver of his privacy rights, law enforcement agencies should categorically "Glomarize" all such third-party requests--refusing either to confirm or deny the existence of responsive records--in order to protect the privacy of those who are in fact the subject of or mentioned in investigatory files.[61] (Prior to Reporters Committee, before an agency could give such a response, it was required to check the requested records, if any existed, for any official acknowledgment of the investigation (e.g., as a result of prosecution) or for any

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[58](...continued)
a scheme to entrap a public official and in the manner in which the agent was disciplined"). But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 567-69 (exceptional finding of public interest in disclosure of unsubstantiated allegations); McCutchen v. HHS, slip op. at 10 (finding significant public interest in disclosing identities of scientists investigated on (and ultimately cleared of) charges of scientific misconduct, based upon belief that such disclosure would foster greater public oversight).

[59] SafeCard Servs., Inc. v. SEC, 926 F.2d at 1206; see, e.g., Coleman v. FBI, No. 89-2773, slip op. at 16 (D.D.C. Dec. 10, 1991) (citing SafeCard Servs., Inc. v. SEC, 926 F.2d at 1205-06)), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992).

[60] See Ray v. United States Dep't of Justice, 778 F. Supp. at 1215; FOIA Update, Summer 1989, at 5; FOIA Update, Winter 1986, at 3-4 ("OIP Guidance: Privacy 'Glomarization'"); FOIA Update, Sept. 1982, at 2; see also Massey v. FBI, slip op. at 5675 ("individuals have substantial privacy interests in information that either confirms or suggests that they have been subject to criminal investigations or proceedings"); Antonelli v. FBI, 721 F.2d at 617 ("even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect").

[61] See Antonelli v. FBI, 721 F.2d at 617 ("Glomar" response appropriate for third-party requests where requester has identified no public interest in disclosure); Durham v. United States Postal Serv., slip op. at 4-5 ("Glomar" response concerning possible subject of murder investigation warranted); FOIA Update, Summer 1989, at 5; FOIA Update, Winter 1986, at 3-4.

overriding public interest in disclosure that would render "Glomarization" inapplicable. However, in Reporters Committee, the Supreme Court eliminated the need to consider whether there has been a prior acknowledgment when it expressly "recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public."[62] Further, as the very fact of an arrest and conviction of a person, as reflected in his FBI "rap sheet," creates a cognizable privacy interest, any underlying investigative file, containing a far more detailed account of the subject's activities, gives rise to an even greater privacy interest.[63])

At the litigation stage, the agency must demonstrate to the court, either through a Vaughn affidavit or an in camera submission, that its refusal to confirm or deny the existence of responsive records is appropriate.[64] Although this "refusal to confirm or deny" approach is now widely accepted in the case law,[65] several cases have illustrated the procedural difficulties involved in de-

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[62] 489 U.S. at 767.

[63] See FOIA Update, Summer 1989, at 5 (under Reporters Committee, Exemption 7(C) "Glomarization" can be undertaken without review of any responsive records, in response to third-party requests for routine law enforcement records pertaining to living private citizens who have not given consent to disclosure); see also FOIA Update, Spring 1991, at 6 (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which so doing would reveal sensitive abstract fact about existence of records).

[64] See Ely v. FBI, 781 F.2d 1487, 1492 n.4 (11th Cir. 1986) ("the government must first offer evidence, either publicly or in camera to show that there is a legitimate claim"); Grove v. CIA, 752 F. Supp. at 30 (agency required to conduct search to properly justify use of "Glomar" response in litigation).

[65] See, e.g., Reporters Committee, 489 U.S. at 757 (request for any "rap sheet" on defense contractor); Beck v. Department of Justice, 997 F.2d at 1493-94 (request for records concerning alleged wrongdoing by two named DEA agents); Dunkelberger v. Department of Justice, 906 F.2d at 780, 782 (request for information that could verify alleged misconduct by an undercover FBI agent); Freeman v. United States Dep't of Justice, No. 86-1073, slip op. at 2 (4th Cir. Dec. 29, 1986) (request for alleged FBI informant file of Teamsters president); Strassman v. United States Dep't of Justice, 792 F.2d 1267, 1268 (4th Cir. 1986) (request for records allegedly indicating whether governor of West Virginia threatened to invoke Fifth Amendment); Antonelli v. FBI, 721 F.2d at 616-19 (prisoner seeking files on eight third parties); Durham v. United States Postal Serv., slip op. at 4-5 (prisoner seeking file on possible suspect in murder investigation); Ray v. United States Dep't of Justice, 778 F. Supp. at 1215 (request for any records reflecting results of INS investigation of alleged employee misconduct); Knight Publishing Co. v. United States Dep't of Justice, No. 84-510, slip op. at 1-2 (W.D.N.C. Mar. 28, 1985) (newspaper seeking any DEA investigatory file on governor, lieutenant governor or attorney general of North Carolina); Ray v. Department of Justice, No. 3-84-1234, slip op. at 2-3

(continued...)

fending a "Glomar" response when the requester's "speculation" as to the contents of the records (if any exist) raises a qualifying public interest.[66] And when a third-party request is made for both administrative and investigatory records, an agency may need to bifurcate the request: The agency can provide a substantive response to the administrative records aspect and a "Glomar" response to the investigatory records aspect of the request.[67]

The significantly lessened certainty of harm now required under Exemption 7(C) and the approval of "categorical" withholding of privacy-related law enforcement information in most instances should permit agencies to afford full protection to personal privacy interests in law enforcement files wherever it can reasonably be foreseen that those interests are threatened by a contemplated FOIA disclosure.[68]

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[65](...continued)
(M.D. Tenn. Nov. 28, 1984) (convicted killer of Dr. Martin Luther King, Jr., seeking file on former Tennessee state senator who introduced legislation which would bar convicts from receiving payment for literary works); Ely v. Secret Serv., No. 83-2080, slip op. at 1-2 (D.D.C. Dec. 14, 1983) (inmate seeking file on third party "well known to plaintiff"); Ray v. United States Dep't of Justice, 558 F. Supp. 226, 228-29 (D.D.C. 1982) (convicted killer of Dr. Martin Luther King, Jr., seeking any file on his former attorney, Percy Foreman, or Congressman Louis Stokes), aff'd, 720 F.2d 216 (D.C. Cir. 1983) (table cite); Blakey v. Department of Justice, 549 F. Supp. 362, 365-66 (D.D.C. 1982) (professor seeking any records relating to a minor figure in investigation of assassination of President Kennedy who was indexed under topics other than Kennedy assassination), aff'd in part & vacated in part, 720 F.2d 215 (D.C. Cir. 1983) (table cite); Rushford v. Civiletti, 485 F. Supp. at 479-81 (reporter seeking criminal files on federal judges).

[66] See Shaw v. FBI, 604 F. Supp. 342, 344-45 (D.D.C. 1985) (requester seeking any investigatory files on individuals whom he believed participated in assassination of President Kennedy); Flynn v. United States Dep't of Justice, No. 83-2282, slip op. at 1-3 (D.D.C. Feb. 18, 1984) (allegation of documents reflecting judicial bias), summary judgment for agency granted (D.D.C. Apr. 6, 1984); see also Knight Publishing Co. v. United States Dep't of Justice, slip op. at 2 (on motion to compel unsealing of in camera affidavit).

[67] See, e.g., Grove v. Department of Justice, 802 F. Supp. at 510-11 (agency conducted search for administrative records sought but "Glomarized" part of request concerning investigatory records); accord Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1981) (early "Glomarization" case bifurcating between classified and unclassified activities) (Exemptions 1 and 3).

[68] See Attorney General's Memorandum at 9-12; see also Stone v. FBI, 727 F. Supp. at 665 (discussing breadth of Exemption 7(C) protection after 1986 FOIA amendments).

EXEMPTION 7(D)

It has long been recognized that Exemption 7(D) of the FOIA, which protects against disclosure of information pertaining to confidential sources, affords the most comprehensive protection of all of the FOIA's law enforcement exemptions. Moreover, the Freedom of Information Reform Act of 1986 significantly strengthened the protections of Exemption 7(D) in a number of respects.[1]

As amended, Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."[2]

Although in some respects the 1986 FOIA amendments essentially codified what had been the prevailing judicial interpretation of the prior language of the exemption, in other areas the amendments represent a significant expansion of the exemption's shield for confidential sources. Both Congress and the courts have clearly manifested their appreciation that a "robust" Exemption 7(D) is crucial[3] to ensuring that "confidential sources are not lost through retaliation against the sources for past disclosure[4] or because of the sources' fear of

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[1] See Irons v. FBI, 880 F.2d 1446, 1452 (1st Cir. 1989) (en banc) ("'In 1986 Congress acted again to . . . broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it.'") (quoting Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987)); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 11 (D.D.C. 1991) (same); Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 13-15 (Dec. 1987) [hereinafter Attorney General's Memorandum].

[2] 5 U.S.C. § 552(b)(7)(D) (1988).

[3] Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985); Johnson v. United States Dep't of Justice, 739 F.2d 1514, 1518 (10th Cir. 1984).

[4] See, e.g., KTVY-TV v. United States, 919 F.2d 1465, 1470-71 (10th Cir. 1990) (per curiam) ("indications of fear of harassment and embarrassment support an implied request for confidentiality"); Keys v. United States Dep't of Justice, 830 F.2d 337, 345-46 (D.C. Cir. 1987) (fear of "harassment, ridicule or retaliation" by interviewees justifies nondisclosure); Williams v. FBI, 822 F. Supp. 808, 814 (D.D.C. 1993) (same); Engelking v. DEA, No. 91-165, slip op. at 9 (D.D.C. Nov. 30, 1992) ("assistance . . . would be inhibited as a result of fear of exposure and possible retaliation"); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 13 (D.D.C. Sept. 24, 1992) ("information . . . must be afforded protection to ensure that cooperating private citizens will not be subjected to harassment and will continue to cooperate");

(continued...)

future disclosure."[5]

As previously noted, the shift from the "would constitute" to the "could reasonably be expected to constitute" standard in the threshold of the exemption should "ease considerably" a federal law enforcement agency's burdens in justifying withholding.[6] Moreover, by specifically identifying particular categories of individuals and institutions to be included in the term "source," the FOIA Reform Act enacted into positive law the position reflected in the legislative history of the 1974 amendments to the FOIA: that the term "confidential source" was chosen by design to encompass a broader group than would have been included had the term "informer" been used.[7]

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[4](...continued)
Gula v. Meese, 699 F. Supp. 956, 960 (D.D.C. 1988) ("[S]uccess of law enforcement investigations rests upon information provided by individuals who may be exposed to relentless harassment and possible harm if their identities were revealed."); see also Struth v. FBI, 673 F. Supp. 949, 965 (E.D. Wis. 1987) ("[T]his exemption need not be construed narrowly because, in enacting it, Congress displayed an intent to preserve, not destroy, confidentiality in certain necessary situations.").

[5] See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 53 (3d Cir. Sept. 21, 1993) ("goal of Exemption 7(D) [is] to protect the ability of law enforcement agencies to obtain the cooperation of persons having relevant information and who expect a degree of confidentiality in return for their cooperation") (to be published); Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 563 (1st Cir. 1992) (Exemption 7(D) intended to avert "drying-up" of sources); Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1486 (11th Cir. 1992) ("[F]ear of exposure would chill the public's willingness to cooperate with the FBI . . . [and] would deter future cooperation."); Shaw v. FBI, 749 F.2d 58, 61 (D.C. Cir. 1984) (purpose of Exemption 7(D) is "to prevent the FOIA from causing the 'drying up' of sources of information in criminal investigations"); Johnson v. United States Dep't of Justice, 739 F.2d at 1514 (same); Helmsley v. United States Dep't of Justice, slip op. at 13 ("release of the confidential source information would chill cooperation with the government"); Wagoner v. United States Postal Serv., No. 91-1529, slip op. at 9 (D.D.C. Feb. 5, 1992) (Information "must be afforded protection to ensure that cooperating private citizens will not be subjected to harassment and will continue to cooperate."), summary affirmance granted, No. 92-5101 (D.C. Cir. Dec. 10, 1992); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 60 (D.D.C. 1990) (noting "law enforcement's interest in assuring future sources that their identities will remain confidential").

[6] United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989); see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 564 n.14 ("1986 amendment eased the government's burden of proof substantially"); Attorney General's Memorandum at 9-13.

[7] See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6291.

By its own terms, however, this statutory enumeration is not exhaustive. The term "source" historically has been interpreted to include a broad variety of individuals and institutions not legislatively specified, such as crime victims,[8] citizens providing unsolicited allegations of misconduct,[9] citizens responding to inquiries from law enforcement agencies,[10] private employees responding to an OSHA investigation of an industrial accident,[11] prisoners,[12] mental healthcare facilities,[13] and commercial or financial institutions.[14] Both the statute and the case law have recognized that sources include state and local law enforcement agencies[15] and that they include foreign law enforcement agencies as

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[8] See, e.g., Coleman v. FBI, No. 89-2773, slip op. at 21 (D.D.C. Dec. 10, 1991), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); Gula v. Meese, 699 F. Supp. at 960.

[9] See, e.g., Brant Constr. Co. v. EPA, 778 F.2d at 1263; Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979); Mobil Oil Corp. v. FTC, No. 74-Civ-311, slip op. at 3 (S.D.N.Y. Dec. 7, 1978).

[10] See, e.g., Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 565; Miller v. Bell, 661 F.2d 623, 627-28 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

[11] See, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 924-25 (11th Cir. 1984).

[12] Johnson v. Federal Bureau of Prisons, No. CV-90-H-645-E, slip op. at 6-7 (N.D. Ala. Nov. 1, 1990).

[13] See, e.g., Sanders v. United States Dep't of Justice, No. 91-2263, slip op. at 9 (D. Kan. Apr. 21, 1992).

[14] See, e.g., Jones v. FBI, No. C77-1001, slip op. at 16 (N.D. Ohio June 2, 1991) (magistrate's recommendation), adopted (N.D. Ohio Aug. 12, 1992) (appeal pending); Coleman v. FBI, slip op. at 22; McCoy v. Moschella, No. 89-2155, slip op. at 2 (D.D.C. Sept. 30, 1991); Founding Church of Scientology v. Levi, 579 F. Supp. 1060, 1063 (D.D.C. 1982), aff'd, 721 F.2d 828 (D.C. Cir. 1983); Biberman v. FBI, 528 F. Supp. 1140, 1143 (S.D.N.Y. 1982); Dunaway v. Webster, 519 F. Supp. 1059, 1082 (N.D. Cal. 1981).

[15] See, e.g., Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 & n.27 (10th Cir. 1989) (Exemption 7(D) "encourages cooperation and information sharing between local law enforcement agencies and the FBI."), cert. denied, 497 U.S. 1010 (1990); Parton v. United States Dep't of Justice, 727 F.2d 774, 775-77 (8th Cir. 1984) (state prison officials interviewed in connection with civil rights investigation); Lesar v. United States Dep't of Justice, 636 F.2d 472, 489-91 (D.C. Cir. 1980); Shafmaster Fishing Co. v. United States, 814 F. Supp. 182, 184 (D.N.H. 1993); Watson v. United States Dep't of Justice, 799 F. Supp. 193, 196 (D.D.C. 1993) (state bureau of investigation); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 400 (W.D.N.Y. 1992).

well.[16] Other federal law enforcement agencies, however, should not receive protection as confidential sources.[17]

The same underlying considerations which mandate that a broad spectrum of individuals and institutions be encompassed by the term "source" also require that the adjective "confidential" be entitled to a similarly broad construction: It merely signifies that the information was provided in confidence or in trust, with the assurance that it would not be disclosed to others.[18] Thus, "the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."[19] And because

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[16] See, e.g., Shaw v. FBI, 749 F.2d at 62; Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1491-92 (D.C. Cir. 1984); Founding Church of Scientology v. Regan, 670 F.2d 1158, 1161-62 (D.C. Cir. 1981) (including foreign Interpol national bureaus), cert. denied, 456 U.S. 976 (1982); Shafmaster Fishing Co. v. United States, 814 F. Supp. at 184; Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, No. 89-707, slip op. at 10 (C.D. Cal. Sept. 10, 1991) (foreign Interpol national bureaus). But see also United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2022 (1993) (establishing more specific evidentiary standard for demonstrating that any such source provided information based upon an implied understanding of confidentiality).

[17] See Retail Credit Co. v. FTC, 1976-1 Trade Cas. (CCH) ¶ 60,727, at 68,127 n.3 (D.D.C. May 10, 1976); see also FOIA Update, Spring 1984, at 7.

[18] See, e.g., Nadler v. United States Dep't of Justice, 955 F.2d at 1484; Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 575-76 (D.C. Cir. 1990); Irons v. FBI, 880 F.2d at 1448; Shaw v. FBI, 749 F.2d at 61; Radowich v. United States Attorney, Dist. of Md., 658 F.2d 957, 959 (4th Cir. 1981); Coleman v. FBI, slip op. at 22; Borton, Inc. v. OSHA, 566 F. Supp. 1420, 1425 (E.D. La. 1983) (magistrate's recommendation published as "appendix").

[19] United States Dep't of Justice v. Landano, 113 S. Ct. at 2019; see McDonnell v. United States, slip op. at 54 ("content based test [is] not appropriate in evaluating a document for Exemption 7(D) status, rather the proper focus of the inquiry is on the source of the information"); Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 563 ("confidentiality depends not on [document's] contents but on the terms and circumstances under which" agency acquired information); Ferguson v. FBI, 957 F.2d at 1069 (key to withholding under Exemption 7(D) is document content and not circumstances under which information obtained); Weisberg v. United States Dep't of Justice, 745 F.2d at 1492 ("[T]he availability of Exemption 7(D) depends not upon the factual contents of the document sought, but upon whether the source was confidential."); Shaw v. FBI, 749 F.2d at 61 (same); Lesar v. United States Dep't of Justice, 636 F.2d at 492; Gordon v. Thornberg, 790 F. Supp. 374, 377 (D.R.I. 1992) (term "'confidential' means provided in confidence or trust; neither the information nor the source need be 'secret'"); Gale v. FBI, 141 F.R.D.

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the applicability of this exemption hinges on the circumstances under which the information is provided, and not exclusively on the harm resulting from disclosure (in contrast to Exemptions 6 and 7(C)), no balancing test is applied under Exemption 7(D).[20]

The first clause of Exemption 7(D), with respect to any civil or criminal law enforcement records, focuses upon the identity of a confidential source, rather than the information furnished by the source. The 1974 legislative history of Exemption 7(D), though, plainly evidences Congress's intention to absolutely and comprehensively protect the identity of anyone who provided information to a government agency in confidence.[21] Thus, this exemption's first clause protects "both the identity of the informer and information which might reasonably be found to lead to disclosure of such identity."[22] Consequently, the courts have readily recognized that the first clause of Exemption 7(D) safeguards not only such obviously identifying information as an informant's name and address,[23] but also all information which would "tend to reveal" the source's identity.[24]

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[19](...continued)
94, 98 (N.D. Ill. 1992) ("focus[] on the source of the information, not the information itself"); accord Dow Jones & Co. v. Department of Justice, 917 F.2d at 575; Schmerler v. FBI, 900 F.2d 333, 338 (D.C. Cir. 1990); Lesar v. United States Dep't of Justice, 636 F.2d at 492.

[20] See, e.g., McDonnell v. United States, slip op. at 52 (Exemption "7(D) does not entail a balancing of public and private interests"); Ferguson v. FBI, 957 F.2d at 1068 ("If we are to hold that the unique circumstances here justify a deviation from the blanket rule, we would be opening the door for a time-consuming consideration of factors in every situation."); Nadler v. United States Dep't of Justice, 955 F.2d at 1487 n.8 ("Once a source has been found to be confidential, Exemption 7(D) does not require the Government to justify its decision to withhold information against the competing claim that the public interest weighs in favor of disclosure."); Parker v. Department of Justice, 934 F.2d 375, 380 (D.C. Cir. 1991) ("judiciary is not to balance interests under Exemption 7(D)"); Schmerler v. FBI, 900 F.2d at 336 ("statute admits no such balancing"); Katz v. FBI, No. 87-3712, slip op. at 9 (5th Cir. Mar. 30, 1988); Irons v. FBI, 811 F.2d at 685; Brant Constr. Co. v. EPA, 778 F.2d at 1262-63 ("Congress has struck the balance in favor of nondisclosure."); Cuccaro v. Secretary of Labor, 770 F.2d 355, 360 (3d Cir. 1985); Sands v. Murphy, 633 F.2d 968, 971 (1st Cir. 1980).

[21] See S. Conf. Rep. No. 1200 at 13.

[22] 120 Cong. Rec. 17033 (1974) (statement of Sen. Hart).

[23] See Cuccaro v. Secretary of Labor, 770 F.2d at 359-60; Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, No. 1:87-2384, slip op. at 12 (N.D. Ohio Apr. 22, 1992) (magistrate's recommendation), adopted (N.D. Ohio May 11, 1992).

[24] Pollard v. FBI, 705 F.2d 1151, 1155 (9th Cir. 1983); see, e.g., Williams
(continued...)

Accordingly, protection for source-identifying information extends well beyond material which is merely a substitute for the source's name. To prevent indirect identification of a source, even the name of a third party who is not a confidential source--but who acted as an intermediary for the source in his dealings with the agency--can be withheld.[25] And when circumstances warrant, a law enforcement agency may employ a "Glomar" response--refusing to confirm or deny the very existence of records about a particular individual--if a more specific response to a narrowly targeted request would reflect that he acted as a confidential source.[26] Even greater source-identification protection is now provided by the "(c)(2) exclusion,"[27] which permits a criminal law enforcement agency to entirely exclude records from the FOIA under specified circumstances when necessary to avoid divulging the existence of a source relationship. (See discussion of Exclusions, below.) Additionally, information provided by a source may be withheld under the first clause of Exemption 7(D) where disclosure of that information would permit the "linking" of a source to specific source-provided material.[28]

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[24](...continued)
v. FBI, 822 F. Supp. at 812 n.1 & 813-14 (source symbol numbers and source file numbers); Church of Scientology v. IRS, 816 F. Supp. 1138, 1161 (W.D. Tex. 1993) ("agency may withhold any portion of the document that would reveal the identity of the confidential source") (appeal pending); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 21 (D.D.C. 1992) (where source well known to investigated applicant, agency must protect "even the most oblique indications of identity"); Soto v. DEA, No. 90-1816, slip op. at 6 (D.D.C. Apr. 13, 1992) ("'coded' informants" and "dates, locations, and circumstances by which someone familiar with the criminal enterprise could deduce the informant's identity" protected); Church of Scientology Int'l v. United States Nat'l Cent. Bureau-Interpol, slip op. at 10 ("information with a realistic likelihood of disclosing the source's identity may be redacted"); McDonnell v. United States, No. 88-3682, slip op. at 45 n.20 (D.N.J. June 10, 1991) (magistrate's recommendation), adopted (D.N.J. Sept. 6, 1991) (permanent symbol numbers), aff'd in pertinent part & rev'd & remanded, No. 91-5916 (3d Cir. Sept. 21, 1993); Katz v. Webster, No. 82-Civ-1092, slip op. at 26 (S.D.N.Y. May 20, 1985) (source and symbol file numbers); Martinez v. FBI, No. 82-1547, slip op. at 13 (D.D.C. Oct. 11, 1983) (same).

[25] See Birch v. Postal Serv., 803 F.2d 1206, 1212 (D.C. Cir. 1986); United Technologies Corp. v. NLRB, 777 F.2d 90, 95 (2d Cir. 1985).

[26] See Benavides v. DEA, 769 F. Supp. 380, 381-82 (D.D.C. 1990), rev'd & remanded on procedural grounds, 968 F.2d 1243, modified, 976 F.2d 751 (D.C. Cir. 1992).

[27] 5 U.S.C. § 552(c)(2) (1988).

[28] L&C Marine Transp., Ltd. v. United States, 740 F.2d at 923-25; see, e.g., Stone v. Defense Investigative Serv., 816 F. Supp. 782, 788 (D.D.C. 1993) (withholding proper where "information so singular that to release it would likely identify the individual") (appeal pending); Barrett v. OSHA, No. C2-90-147, slip op. at 13 (S.D. Ohio Oct. 18, 1990) (protecting statements
(continued...)

EXEMPTION 7(D)

Informants' identities are protected wherever they have provided information either under an express promise of confidentiality,[29] or "under circumstances from which such an assurance could be reasonably inferred."[30] Courts have uniformly recognized that express promises of confidentiality are deserving of protection under Exemption 7(D).[31] Several courts have held that the identities of persons providing statements in response to routinely given "unsolicited assurances of confidentiality" are protectable under Exemption 7(D) as well.[32]

Historically, there had existed a conflict in the case law as to the availability of Exemption 7(D) protection for sources who were advised that they

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[28](...continued)
obtained from witnesses regarding single incident involving only three or four persons).

[29] See KTVY-TV v. United States, 919 F.2d at 1470; King v. United States Dep't of Justice, 830 F.2d 210, 235 (D.C. Cir. 1987); Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, slip op. at 14 (telling interviewees "that their identities, as well as any information they relayed, would be held in confidence" equals an express promise of confidentiality); Savada v. DOD, 755 F. Supp. 6, 8 (D.D.C. 1991); Simon v. United States Dep't of Justice, 752 F. Supp. 14, 21 (D.D.C. 1990), aff'd, 980 F.2d 782 (D.C. Cir. 1992).

[30] S. Conf. Rep. No. 1200 at 13; United States Dep't of Justice v. Landano, 113 S. Ct. at 2019 (same).

[31] See McDonnell v. United States, slip op. at 53 ("identity of and information provided by [persons given an express assurance of confidentiality] are exempt from disclosure under the express language of Exemption 7(D)"); Wiener v. FBI, 943 F.2d 972, 986 (9th Cir. 1991) ("An express grant of confidentiality is virtually unassailable . . . [agency] need only establish the informant was told his name would be held in confidence."), cert. denied, 112 S. Ct. 3013 (1992); Birch v. United States Postal Serv., 803 F.2d 1206, 1212 (D.C. Cir. 1986) ("Since the informant requested and received express assurances of confidentiality prior to assisting the investigation, he or she was a 'confidential source.'"); Buhovecky v. Department of Justice, 700 F. Supp. 566, 571 (D.D.C. 1988) ("there is clear authority to withhold the names of those sources to whom confidentiality was expressly granted"); Simon v. United States Dep't of Justice, 752 F. Supp. at 21 (withholding proper where "source explicitly requested that his identity be kept confidential"); Nishnic v. United States Dep't of Justice, 671 F. Supp. 776, 799 (D.D.C. 1987) (source identity properly withheld where agency "made an express assurance of confidentiality" to source).

[32] See, e.g., Brant Constr. Co. v. EPA, 778 F.2d at 1263; L&C Marine Transp., Ltd. v. United States, 740 F.2d at 924 n.5; Pope v. United States, 599 F.2d at 1386-87; Borton, Inc. v. OSHA, 566 F. Supp. at 1422; see also Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 555, 565 (24 individuals held to have been provided express promises of confidentiality based upon IG regulation).

might be called to testify if a trial eventually were to take place.[33] However, in United States Department of Justice v. Landano,[34] the Supreme Court resolved this conflict by holding that "[a] source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent . . . thought necessary for law enforcement purposes."[35] (It should be noted that the effect of a source's actual testimony upon Exemption 7(D) protection presents a distinctly different issue,[36] which is addressed below together with other issues regarding waiver of this exemption.)

In contrast to the situation involving express confidentiality, a particularly difficult issue under Exemption 7(D) recently arose regarding the circumstances under which an expectation of confidentiality can be shown to have been implied. An implicit promise of confidentiality may be discerned from the inherent sensitivity of both criminal and civil investigations.[37] Over the years, a number of courts of appeals employed a "presumption" of confidentiality in criminal cases, particularly those involving the FBI.[38] Historically, these

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[33] Compare Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 986 (9th Cir. 1985) (no confidentiality recognized) and Poss v. NLRB, 565 F.2d 654, 658 (10th Cir. 1977) (same) with Irons v. FBI, 811 F.2d at 687 (confidentiality recognized); Schmerler v. FBI, 900 F.2d at 339 (same) and United Technologies Corp. v. NLRB, 777 F.2d at 95 (same).

[34] 113 S. Ct. at 2020.

[35] Id. ("[T]he word 'confidential,' as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy.").

[36] See Parker v. Department of Justice, 934 F.2d at 381.

[37] See, e.g., United Technologies Corp. v. NLRB, 777 F.2d at 94 ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."); see also Voelker v. FBI, 638 F. Supp. 571, 573 (E.D. Mo. 1986) (identifying individuals who supplied information in an FBI background investigation could subject them to "possible loss of business or social standing, ridicule, harassment, and even bodily harm") (Privacy Act case).

[38] D.C. Circuit: Parker v. Department of Justice, 934 F.2d at 378; Dow Jones & Co. v. Department of Justice, 917 F.2d at 576; Schmerler v. FBI, 900 F.2d at 337; Second Circuit: Donovan v. FBI, 806 F.2d 55, 61 (2d Cir. 1986); Diamond v. FBI, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); Sixth Circuit: Ingle v. Department of Justice, 698 F.2d 259, 269 (6th Cir. 1983); Seventh Circuit: Kimberlin v. Department of the Treasury, 774 F.2d 204, 208 (7th Cir. 1985); Miller v. Bell, 661 F.2d at 627; Eighth Circuit: Parton v. United States Dep't of Justice, 727 F.2d at 776; Tenth Circuit: KTVY-TV v. United States, 919 F.2d at 1470; Hopkinson v. Shillinger, 866 F.2d at 1222-23; Johnson v. United States Dep't of Justice, 739 F.2d at 1517-18; Eleventh Circuit: Nadler v. United States Dep't of Justice, 955 F.2d at 1486 & n.7. Contra Wiener v. FBI, 943 F.2d at 986 ("A claim

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courts applied a "categorical" approach to this aspect of Exemption 7(D), of the type generally approved by the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press,[39] thereby eliminating the burdensome task for criminal law enforcement agencies of proving implied confidentiality on a case-by-case basis. However, this past year the Supreme Court effectively reversed all of these cases on this point of evidentiary presumption in Landano.[40]

At issue in Landano was "whether the Government is entitled to a presumption that all sources supplying information to the Federal Bureau of Investigation . . . in the course of a criminal investigation are confidential sources."[41] In deciding Landano, the Supreme Court made clear that its decision affects only implied assurances of confidentiality[42] and that a source need not have an expectation of "total secrecy" to be deemed a confidential source.[43] However, the Court found that it was not Congress' intent to provide for a "universal" presumption or broad categorical withholding under Exemption 7(D)[44]; rather, it said, a "more particularized approach" is required.[45] Under this new approach, agencies seeking to invoke Exemption 7(D) must prove expectations of confidentiality based upon the "circumstances" of each case.[46]

Such specific showings of confidentiality, the Court indicated, can be made on a "generic" basis,[47] where "certain circumstances characteristically

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[38](...continued)
that confidentiality was impliedly granted . . . requires the court to engage in a highly contextual, fact-based inquiry."); Lame v. United States Dep't of Justice, 654 F.2d 917, 928 (3d Cir. 1981) ("detailed explanations relating to each alleged confidential source" required so that court can determine whether Exemption 7(D) withholding appropriate as to "each source").

[39] 489 U.S. 749 (1989).

[40] See 113 S. Ct. at 2023-24.

[41] Id. at 2017.

[42] Id. at 2020 ("The precise question before us . . . is how the Government can meet its burden of showing that a source provided information on an implied assurance of confidentiality.").

[43] Id. ("[A]n exemption so limited that it covered only sources who reasonably could expect total anonymity would be, as a practical matter, no exemption at all.").

[44] Id. at 2021-23.

[45] Id. at 2023.

[46] Id.

[47] Id.

support an inference of confidentiality."[48] Throughout its opinion the Court stressed two "factors" to be applied in deciding whether implicit confidentiality exists: "the nature of the crime . . . and the source's relation to it."[49] It also pointed to five lower court rulings in which the respective courts highlighted the potential for harm to the witness as examples of decisions in which courts have correctly applied these two factors.[50] Henceforth, law enforcement agencies seeking to invoke Exemption 7(D) for "implied confidentiality" sources will have to specifically address such factors in order to meet Landano's new evidentiary standard on a case-by-case basis.[51]

Few courts have yet to address the issue of implied confidentiality in the wake of the Supreme Court's decision in Landano, although several courts have remanded the issue for further review or allowed the government the opportunity to submit supplemental filings in accordance with Landano's new evidentiary requirements.[52] The courts that have addressed the issue under Landano thus far have recognized the nature of the crime and the source's relation to it as the

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[48] Id. at 2022.

[49] Id. at 2023-24.

[50] Id. at 2023 (citing Keys v. United States Dep't of Justice, 830 F.2d at 345-46 (individuals providing information regarding possible Communist sympathies, criminal activity, and murder by foreign operatives would have worried about retaliation); Donovan v. FBI, 806 F.2d at 60-61 (individuals providing information about four American churchwomen murdered in El Salvador may likely face fear of disclosure); Parton v. United States Dep't of Justice, 727 F.2d at 776-77 (prison officials providing information regarding alleged attack on inmate faced "high probability of reprisal"); Nix v. United States, 572 F.2d 998, 1003-04 (4th Cir. 1978) (guards and prison inmates providing information about guards who allegedly beat another inmate face risk of reprisal); Miller v. Bell, 661 F.2d at 628 (individuals providing information about self-proclaimed litigious subject seeking to enlist them in "anti-government crusades" faced "strong potential for harassment")).

[51] Id. at 2024.

[52] See McDonnell v. United States, slip op. at 3, 58; Massey v. FBI, No. 92-6068, slip op. 5667, 5673 (2d Cir. Aug. 27, 1993); Hale v. United States Dep't of Justice, No. 91-6135, slip op. at 4 (10th Cir. Aug. 19, 1993); Selby v. United States Dep't of Justice, No. 92-56348, slip op. at 1 (9th Cir. July 26, 1993); Ferguson v. FBI, No. 92-6272, slip op. at 2 (2d Cir. July 19, 1993); Oliva v. United States Dep't of Justice, 996 F.2d 1475, 1477 (2d Cir. 1993); Steinberg v. United States Dep't of Justice, No. 91-2740, slip op. at 8-9 (D.D.C. Sept. 13, 1993); Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 2 (D.D.C. June 28, 1993); Manchester v. DEA, 823 F. Supp. 1259, 1262 (E.D. Pa. 1993). But see Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 26 (D.D.C. Aug. 24, 1993) (government "has not carried its burden [in light of Landano] of justifying its nondisclosure of the documents, and the documents must be released") (motion for reconsideration pending).

primary factors in determining whether implied confidentiality exists.[53] In two of these cases, courts have already applied these factors to find the existence of implied confidentiality under Landano.[54]

The second clause of Exemption 7(D) protects all information furnished to law enforcement authorities by confidential sources in the course of criminal or lawful national security intelligence investigations.[55] Thus, the statutory requirement of an "investigation," while no longer a component of Exemption 7's threshold language, remains "a predicate of exemption under the second clause of paragraph (D)."[56] For the purposes of this clause, criminal law enforcement authorities include federal agency inspectors general.[57] In an interesting elaboration on the definition of a "criminal investigation," courts have recognized that information originally compiled by local law enforcement authorities in conjunction with a nonfederal criminal investigation fully retains its criminal investigatory character when subsequently obtained by federal authorities,[58] even if received solely for use in a federal civil enforcement

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[53] See McDonnell v. United States, slip op. at 57; Massey v. FBI, slip op. at 5673-74; Hale v. United States Dep't of Justice, slip op. at 3; Steinberg v. United States Dep't of Justice, slip op. at 8; Manna v. United States Dep't of Justice, No. 92-2772, slip op. at 21-22 (D.N.J. Sept. 13, 1993); Government Accountability Project v. NRC, No. 86-3201, slip op. at 9-10 (D.D.C. June 30, 1993); Manchester v. DEA, 823 F. Supp. at 1262.

[54] Manna v. United States Dep't of Justice, slip op. at 22 ("[The] government has provided a particularized showing of circumstances from which confidentiality can reasonably be inferred . . . where there has been disclosure of intelligence information regarding organized crime activity from local or state personnel to federal agents."); Government Accountability Project v. NRC, slip op. at 9-10 (persons providing information "about potentially criminal matters involving co-workers" face "risk of reprisal").

[55] See Shaw v. FBI, 749 F.2d at 63-65 (articulating standard for determining if law enforcement undertaking satisfies "criminal investigation" threshold); Meeropol v. Smith, No. 75-1121, slip op. at 76-78 (D.D.C. Feb. 29, 1984) (intelligence investigations), aff'd in part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986); see, e.g., Ferguson v. FBI, 957 F.2d at 1069 (FBI properly withheld publicly circulated material provided to it by confidential source).

[56] See, e.g., Keys v. United States Dep't of Justice, 830 F.2d at 343.

[57] See Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 563 n.13 (Inspectors General "deemed" same as criminal law enforcement authorities); Brant Constr. Co. v. EPA, 778 F.2d at 1265 (recognizing "substantial similarities between the activities of the FBI and the OIGs").

[58] See Harvey v. United States Dep't of Justice, 747 F. Supp. 29, 38 (D.D.C. 1990).

proceeding.[59] In addition, protection for source-provided information has been extended to information supplied to federal officials by state or local enforcement authorities seeking assistance in pursuing a nonfederal investigation.[60]

Obviously, confidential source information that may be withheld under the second clause of Exemption 7(D) need not be source-identifying.[61] Thus, under the second clause of Exemption 7(D), courts have permitted the withholding of confidential information even after the source's identity has been officially divulged or acknowledged,[62] or where the requester knows the source's

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[59] See Cleveland & Vicinity Dist. Council v. United States Dep't of Labor, slip op. at 12 n.3 (Exemption 7(D) "clearly applies to information obtained from confidential sources in all investigations, both civil and criminal."); Dayo v. INS, No. C-2-83-1422, slip op. at 5-6 (S.D. Ohio Dec. 31, 1985).

[60] See Hopkinson v. Shillinger, 866 F.2d at 1222 (state law enforcement agency's request for FBI laboratory evaluation of evidence submitted by state agency and results of FBI's analysis protected); Gordon v. Thornberg, 790 F. Supp. at 377-78 ("When a state law enforcement agency sends material to an FBI lab for testing, confidentiality is 'inherently implicit.' . . . [A]ll information from another agency must be protected to provide the confidence necessary to law enforcement cooperation."); Rojem v. United States Dep't of Justice, 775 F. Supp. 6, 12 (D.D.C. 1991) (to release file "would unduly discourage States from enlisting the FBI's assistance on criminal cases"), appeal dismissed, No. 92-5088 (D.C. Cir. Nov. 4, 1992); Payne v. United States Dep't of Justice, 772 F. Supp. 229, 231 (E.D. Pa. 1989) (The "requirement is met . . . [when] the documents sought are FBI laboratory and fingerprint examinations of evidence collected by local law enforcement agencies."), aff'd, 904 F.2d 695 (3d Cir. 1990) (table cite).

[61] See, e.g., Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 564 ("agency may not be ordered to disclose information from a confidential source even if nonconfidential sources have provided the agency with the identical information"); see also Parker v. Department of Justice, 934 F.2d at 375; Shaw v. FBI, 749 F.2d at 61-62; Radowich v. United States Attorney, Dist. of Md., 658 F.2d at 964; Duffin v. Carlson, 636 F.2d 709, 712 (D.C. Cir. 1980); Simon v. United States Dep't of Justice, 752 F. Supp. at 22.

[62] See Ferguson v. FBI, 957 F.2d at 1068 (subsequent disclosure of source's identity or some of information provided by source does not require "full disclosure of information provided by such a source"); Shafmaster Fishing Co. v. United States, 814 F. Supp. at 185 (source's identity or information provided need not be "secret" to justify withholding); Church of Scientology v. IRS, 816 F. Supp. at 1161 ("irrelevant that the identity of the confidential source is known"); see, e.g., Cleary v. FBI, 811 F.2d 421, 423 (8th Cir. 1987); Shaw v. FBI, 749 F.2d at 62; Radowich v. United States Attorney, Dist. of Md., 658 F.2d at 964; Lesar v. United States Dep't of Justice, 636 F.2d at 491.

identity.[63] Similarly, information provided by an anonymous source remains protected.[64] Moreover, even where source-provided information has been revealed and the identities of some of the sources independently divulged, Exemption 7(D) can protect against the matching of witnesses' names with the specific information that they supplied.[65]

Because the phrase "confidential information furnished only by the confidential source" sometimes caused confusion in the past, the 1986 FOIA amendments unequivocally clarified the congressional intent by deleting the word "confidential" as a modifier of "information" and omitting the word "only" from this formulation. Even prior to the legislative change, courts regularly employed this portion of Exemption 7(D) to protect all information provided by a confidential source, both because such withholdings were anticipated by the language and legislative history of the statute,[66] and in recognition of the fact that disclosure of any of this material would jeopardize the system of confidentiality that ensures a free flow of information from sources to investigatory agencies.[67] Now, however, courts need look no further than the Act's literal

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[63] See Radowich v. United States Attorney, Dist. of Md., 658 F.2d at 960 (Exemption 7(D) applies even where "identities of confidential sources were known."); see, e.g., L&C Marine Transp., Ltd. v. United States, 740 F.2d at 923, 925 (fact that employee-witnesses could be matched to their statements does not diminish Exemption 7(D) protection); Keeney v. FBI, 630 F.2d 114, 119 n.2 (2d Cir. 1980) (Exemption 7(D) applies to "local law enforcement agencies [that] have now been identified."); Shafmaster Fishing Co. v. United States, 814 F. Supp. at 185 (source's identity "need not be secret to justify withholding information under [E]xemption 7(D)"); Sanders v. United States Dep't of Justice, slip op. at 9 (fact that requester knows identity of source does not eviscerate Exemption 7(D) protection).

[64] See Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 565-67; Mitchell v. Ralston, No. 81-4478, slip op. at 2 (S.D. Ill. Oct. 14, 1982).

[65] See Kirk v. United States Dep't of Justice, 704 F. Supp. 288, 293 (D.D.C. 1989); accord L&C Marine Transp., Ltd. v. United States, 740 F.2d at 925.

[66] See Irons v. FBI, 880 F.2d at 1450-51.

[67] Id. at 1449; Church of Scientology v. IRS, 816 F. Supp. at 1161 (Exemption 7(D) enacted "to ensure that the FOIA did not impair federal law enforcement agencies' ability to gather information"); Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 13 (S.D. Ohio Feb. 9, 1993) ("purpose of Exemption 7(D) is to ensure that the FOIA did not impair the ability of federal law enforcement agencies to gather information, thus to ensure that information continued to flow to those agencies"); Shafmaster Fishing Co. v. FBI, 814 F. Supp. at 185 (object of Exemption 7(D) "'not simply to protect the source, but also to protect the flow of information to the law enforcement agency'") (citing Irons v. FBI, 880 F.2d at 1449, 1453); see, e.g., Shaw v. FBI, 749 F.2d at 62 ("Whatever the phrase 'furnished only by the confidential source' may mean, it

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language to see that all source-provided information is protected in criminal and national security investigations.[68]

Once courts determine the existence of confidentiality under Exemption 7(D), they are reluctant to find a subsequent waiver of the exemption's protections. This restraint stems both from the potentially adverse repercussions that may result from additional disclosures, and from a recognition that any "judicial effort[] to create a 'waiver' exception" to exemption 7(D)'s language runs afoul of the statute's intent to provide "workable rules."[69] It therefore has been observed that a waiver of Exemption 7(D)'s protections should be recognized only upon "'absolutely solid evidence showing that the source of an FBI interview in a law enforcement investigation has manifested complete disregard for confidentiality.'"[70]

Thus, even authorized or official disclosure of some information provided by a confidential source in no way opens the door to disclosure of any of the other information the source has provided.[71] In this vein, it is now well established that source-provided information remains protected even where some of it has been the subject of testimony in open court.[72] Moreover, in order to

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[67](...continued)
assuredly cannot mean 'obtainable only from the confidential source.'"); Weisberg v. United States Dep't of Justice, 745 F.2d at 1492; Duffin v. Carlson, 636 F.2d at 712-13.

[68] See, e.g., Irons v. FBI, 880 F.2d at 1448.

[69] Parker v. Department of Justice, 934 F.2d at 380; Irons v. FBI, 880 F.2d at 1455-56 (citing Reporters Committee, 489 U.S. at 779).

[70] Parker v. Department of Justice, 934 F.2d at 378 (quoting Dow Jones & Co. v. Department of Justice, 908 F.2d 1006, 1011 (D.C. Cir.), superseded, 917 F.2d 571 (D.C. Cir. 1990)).

[71] Shaw v. FBI, 749 F.2d at 62 ("Disclosure of one piece of information received from a particular party--and even the disclosure of that party as its source--does not prevent that party from being a 'confidential source' for other purposes."); Brant Constr. Co. v. EPA, 778 F.2d at 1265 n.8 ("[S]ubsequent disclosure of the information, either partially or completely, does not affect its exempt status under 7(D)."); Johnson v. Department of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("The mere fact that someone makes a public statement concerning an incident does not constitute a waiver of the Bureau's confidential file. A press account may be erroneous or false or, more likely, incomplete.").

[72] See, e.g., Davis v. United States Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992); Ferguson v. FBI, 957 F.2d at 1068 (local law enforcement officer does not lose status as confidential source by testifying in court); Parker v. Department of Justice, 934 F.2d at 379-81 ("[A] government agency is not required to disclose the identity of a confidential source or information conveyed to the agency in confidence in a criminal investigation notwithstanding the possibility that the informant may have testified at a public trial."); Irons v.
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demonstrate a waiver by disclosure through authorized channels, the requester must demonstrate both that "'the exact information given to the [law enforcement authority] has already become public, and the fact that the informant gave the same information to the [law enforcement authority] is also public.'"[73] Consequently, one court has found that the government is not required even to "confirm or deny that persons who testify at trial are also confidential informants."[74]

The lengths to which it is proper to go in order to safeguard informant-provided information are illustrated by one decision holding that letters shown to a suspect for the purpose of prompting a confession were properly denied the suspect under the FOIA--even though the suspect was the very author of the letters which, in turn, had been provided to authorities by a third party.[75] Similarly, the release of informant-related material to a party aligned with an

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[72](...continued)
FBI, 880 F.2d at 1454 ("There is no reason grounded in fairness for requiring a source who disclosed information during testimony to reveal, against his will (or to have the FBI reveal for him), information that he did not disclose in public."); Kimberlin v. Department of the Treasury, 774 F.2d at 209 ("The disclosure [prior to or at trial] of information given in confidence does not render non-confidential any of the information originally provided."); Scherer v. Kelley, 584 F.2d 170, 176 n.7 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979); Johnson v. Federal Bureau of Prisons, slip op. at 6-7 (no waiver notwithstanding fact that individuals were called as plaintiff's witnesses at prison disciplinary hearing and testified in plaintiff's presence); Williams v. FBI, 822 F. Supp. at 183 n.4 ("public testimony by confidential sources does not waive the FBI's right to withhold the identity of or information supplied by a confidential source, when the identity or information is not actually revealed in public"); Kirk v. United States Dep't of Justice, 704 F. Supp. at 293 ("[T]he limited mention of sources in documentation and the fact that certain sources may have testified at trial does not destroy these or other persons' rights of confidentiality."); see also FOIA Update, Spring 1984, at 6; cf. Helmsley v. United States Dep't of Justice, slip op. at 13 (agency may protect information provided by confidential sources who did not testify at trial).

[73] Parker v. Department of Justice, 934 F.2d at 378; Dow Jones & Co. v. Department of Justice, 917 F.2d at 577; see, e.g., Rojem v. United States Dep't of Justice, 775 F. Supp. at 12 (where fact of law enforcement agency's communication with FBI known, substance still should be protected); see also Davis v. United States Dep't of Justice, 968 F.2d at 1280 (government entitled to withhold tapes obtained through informant's assistance "unless it is specifically shown that those tapes, or portions of them, were played during the informant's testimony").

[74] Schmerler v. FBI, 900 F.2d at 339 (testimony by source does not automatically waive confidentiality because he may be able "to camouflage his true role notwithstanding his court appearance") (quoting Irons v. FBI, 811 F.2d at 687); see also Parker v. Department of Justice, 934 F.2d at 381.

[75] See Gula v. Meese, 699 F. Supp. at 960.

agency in an administrative proceeding in no way diminishes the government's ability to invoke Exemption 7(D) in response to a subsequent request by a non-allied party.[76] Logically, this principle should be extended to encompass parties aligned with the government in actual litigation as well. Nor is the protection of Exemption 7(D) forfeited by "court-ordered and court-supervised" disclosure to an opponent in civil discovery.[77] Although it had previously been held that where the government fails to object in any way to such discovery and consciously and deliberately puts confidential source material into the public record, a waiver of the exemption will be found to have occurred,[78] more recent decisions have undermined this position.[79] However, "if the exact information given to the [law enforcement agency] has already become public, and the fact that the informant gave the same information to the [agency] is also public, there would be no grounds to withhold."[80]

Obviously, if no waiver of Exemption 7(D) results from authorized release of relevant information, "[t]he per se limitation on disclosure under 7(D) does not disappear if the identity of the confidential source becomes known through other means."[81] It should be observed that in the unusual situation in which an agency elects to publicly disclose source-identifying or source-provided information as necessary in furtherance of an important agency function, it "has no duty to seek the witness's permission to waive his confidential status under the Act."[82] Conversely, because Exemption 7(D) "mainly seeks to pro-

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[76] United Technologies Corp. v. NLRB, 777 F.2d at 95-96; accord FOIA Update, Spring 1983, at 6.

[77] Donohue v. United States Dep't of Justice, No. 84-3451, slip op. at 11 (D.D.C. Dec. 23, 1987).

[78] Nishnic v. United States Dep't of Justice, 671 F. Supp. at 812.

[79] See Glick v. Department of Justice, No. 89-3279, slip op. at 8-9 (D.D.C. June 20, 1991); see also Parker v. Department of Justice, 934 F.2d at 380 ("[J]udicial efforts to create a 'waiver' exception to the Exemption are contrary to the statute's intent to provide workable rules.").

[80] Dow Jones & Co. v. Department of Justice, 917 F.2d at 577.

[81] L&C Marine Transp., Ltd. v. United States, 740 F.2d at 925 (first clause of Exemption 7(D)); see, e.g., Weisberg v. United States Dep't of Justice, 745 F.2d at 1491 (joint withholding under Exemptions 7(C) and 7(D)); Lesar v. Department of Justice, 636 F.2d at 491 (information provided by local law enforcement agencies whose participation had become known); Keeney v. FBI, 630 F.2d at 119 n.2 (confidentiality for information supplied by local law enforcement agency unaffected by identification of agency as source).

[82] Borton, Inc. v. OSHA, 566 F. Supp. at 1422; see, e.g., Doe v. United States Dep't of Justice, 790 F. Supp. at 21-22 ("[T]he FBI is not required to try to persuade people to change their minds[; to] require the FBI on a regular basis to urge its sources to waive confidentiality would undermine the Bureau's effectiveness.").

tect law enforcement agencies in their efforts to find future sources,"[83] "'waiver' by 'sources' will not automatically prove sufficient to release the [source-provided] information."[84]

Of course, Exemption 7(D)'s protection for sources and the information they have provided is in no way diminished by the fact that an investigation has been closed.[85] Indeed, because of the vital role that Exemption 7(D) plays in promoting effective law enforcement, courts have regularly recognized that its protections cannot be lost through the mere passage of time.[86] Additionally, unlike with Exemption 7(C), the safeguards of Exemption 7(D) remain wholly undiminished by the death of the source.[87]

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[83] Irons v. FBI, 880 F.2d at 1453; see, e.g., Koch v. United States Postal Serv., No. 92-233, slip op. at 12 (W.D. Mo. Dec. 17, 1992) ("If the informant's identity is disclosed . . . , individuals would be less likely to come forward with information in future investigations.").

[84] Id. at 1452. But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d at 567 n.16 (express waiver of confidentiality by source vitiates Exemption 7(D) protection).

[85] See KTVY-TV v. United States, 919 F.2d at 1470-71; Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 573 (6th Cir. 1986); Church of Scientology v. IRS, 816 F. Supp. at 1161 (source identity and information provided "remains confidential . . . after the investigation is concluded"); Soto v. DEA, slip op. at 7 ("It is of no consequence that these sources provided information relating to a criminal investigation which has since been completed."); Gale v. FBI, 141 F.R.D. at 98 (Exemption 7(D) protects statements made even "while no investigation is pending.").

[86] See, e.g., Schmerler v. FBI, 900 F.2d at 336 ("The statute contains no sunset provision . . . ."); Keys v. Department of Justice, 830 F.2d at 346 ("'Congress has not established a time limitation for exemption (7)(D) and it would be both impractical and inappropriate for the Court to do so.'" (quoting Keys v. Department of Justice, slip op. at 7)); King v. United States Dep't of Justice, 830 F.2d at 212-13, 236 (interviews conducted in 1941 and 1952 protected); Irons v. FBI, 811 F.2d at 689 (information regarding 1948-56 Smith Act trials protected); Brant Constr. Co. v. EPA, 778 F.2d at 1265 n.8 (in view of "policy of 7(D) to protect future sources of information," passage of time "does not alter status" of source-provided information); Diamond v. FBI, 707 F.2d at 76-77 (protecting McCarthy-era documents); Fitzgibbon v. United States Secret Serv., 747 F. Supp. at 60 (information regarding alleged 1961 plot against President Kennedy by Trujillo regime in Cuba); Abrams v. FBI, 511 F. Supp. 758, 762-63 (N.D. Ill. 1981) (protecting 27-year-old documents).

[87] See, e.g., McDonnell v. United States, slip op. at 54 (consideration of whether source "deceased does not extend to the information withheld pursuant to Exemption 7(D)"); Schmerler v. FBI, 900 F.2d at 336 ("[T]hat the sources may have died is of no moment to the analysis."); Kiraly v. FBI, 728 F.2d at 279 (information provided by deceased source who also testified at trial); Cohen v. Smith, No. 81-5365, slip op. at 4 (9th Cir. Mar. 25, 1983), cert. denied,

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Perhaps because Exemption 7(D) had been traditionally afforded such a broad construction by the courts, few opinions since the passage of the FOIA Reform Act have hinged on its specific revisions. It is evident, however, that the Act's relaxation of Exemption 7(D)'s harm standard, in conjunction with the other legislative amendments to it, strives to ensure that the utmost protections possible will continue to be afforded to confidential sources.[88] All federal agencies maintaining law enforcement information should be applying the strengthened Exemption 7(D) to provide adequate source protection. They should employ, in the words of one of the first courts to consider the matter under the Reform Act, "[a] 'robust' reading of exemption 7(D)."[89]

EXEMPTION 7(E)

As with other parts of Exemption 7, Exemption 7(E) was significantly strengthened by the Freedom of Information Reform Act of 1986.[1] Previously, Exemption 7(E) encompassed only investigatory records compiled for law enforcement purposes the production of which "would . . . disclose investigative techniques and procedures."[2] It now affords protection to all law enforcement information which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[3] Thus, all of the applications of Exemption 7(E) recognized under its former version are in no way diminished by the provision's amendment and remain fully effective.

As reconstituted, the first clause of Exemption 7(E) permits the withholding of "records or information compiled for law enforcement purposes . . . [which] would disclose techniques and procedures for law enforcement investi-

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[87](...continued)
464 U.S. 939 (1983); Jones v. FBI, slip op. at 14 (identity protected "even if the informant is dead"); see also FOIA Update, Summer 1983, at 5; cf. Allen v. DOD, 658 F. Supp. 15, 20 (D.D.C. 1986) (protection of deceased intelligence sources under Exemption 1).

[88] See Attorney General's Memorandum at 13.

[89] Sluby v. United States Dep't of Justice, No. 86-1503, slip op. at 5 (D.D.C. Apr. 30, 1987); accord Irons v. FBI, 811 F.2d at 687-89 (post-amendment decision extending Exemption 7(D) protection to sources who received only conditional assurances of confidentiality).

[1] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49.

[2] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 15 (Dec. 1987) [hereinafter Attorney General's Memorandum].

[3] 5 U.S.C. § 552(b)(7)(E) (1988).

gations or prosecutions."[4] It should not be overlooked that this first clause is phrased in such a way as to not require any particular determination of harm--or risk of circumvention of law--that would be caused by disclosure of the records or information within its coverage. Rather, it is designed to provide a more "categorical" protection of the information so described.[5]

Notwithstanding this broadening of the scope of Exemption 7(E)'s protection, the general requirement that the technique or procedure not be already well known to the public remains.[6] Examples of investigatory techniques previously held not protectible under Exemption 7(E) because courts have found them to be publicly known are "documentation appropriate for seeking search warrants before launching raiding parties" when this information has been revealed in court records,[7] "mail covers" and the "use of post office boxes,"[8] "security flashes," and the "tagging of fingerprints."[9]

Post-amendment cases have dealt similarly with this requirement, holding that details of a pretext contact which constituted "no more than a garden variety ruse or misrepresentation" were ineligible for Exemption 7(E) protection,[10] and disallowing the use of Exemption 7(E) where there was no indication "that disclosure of these documents would reveal secret investigative techniques."[11]

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[4] Id.

[5] See Attorney General's Memorandum at 16 n.27.

[6] See Attorney General's Memorandum at 16 n.27 (citing S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (citing, in turn, H.R. Rep. No. 180, 93d Cong., 2d Sess. 12 (1974))).

[7] National Org. for the Reform of Marihuana Laws v. DEA, No. 80-1339, slip op. at 8 (D.D.C. June 24, 1981).

[8] Dunaway v. Webster, 519 F. Supp. 1059, 1082-83 (N.D. Cal. 1981).

[9] Ferguson v. Kelley, 448 F. Supp. 919, 926 (N.D. Ill. 1977).

[10] Struth v. FBI, 673 F. Supp. 949, 970 (E.D. Wis. 1987); see also Rosenfeld v. United States Dep't of Justice, 761 F. Supp. 1440, 1450 (N.D. Cal. 1991) (information pertaining to specific pretext phone call held ineligible for exemption protection) (appeal pending). But see also Nolan v. United States Dep't of Justice, No. 89-A-2035, slip op. at 13 (D. Colo. Mar. 13, 1991) (information surrounding pretext phone call properly withheld because disclosure may harm ongoing investigations), aff'd on other grounds, 973 F.2d 843 (10th Cir. 1992).

[11] Smith v. United States Dep't of Justice, No. 86-6162, slip op. at 2 (E.D. Pa. Sept. 1, 1987); see also Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992) (computer algorithm used by Department of Transportation to determine safety rating of motor carriers "does not simply involve investigative techniques or procedures" because it has same status as regulations or agency law); Albuquerque Publishing Co. v. United States Dep't

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However, even commonly known procedures have been protected from release where "[t]he techniques themselves may be known to the public, but the circumstances of their usefulness . . . may not be widely known,"[12] or where "their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a 'technique' which merits protection to insure its future effectiveness."[13]

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[11](...continued)
of Justice, 726 F. Supp. 851, 858 (D. Ariz. 1989) (agencies "should avoid burdening the Court with techniques commonly described in movies, popular novels, stories or magazines or television"); Astley v. Lawson, No. 89-2806, slip op. at 13 (D.D.C. Jan. 11, 1991) (mere assertion that technique falls within scope of exemption is insufficient).

[12] Parker v. United States Dep't of Justice, No. 88-760, slip op. at 8 (D.D.C. Feb. 28, 1990), aff'd in pertinent part, No. 90-5070 (D.C. Cir. June 28, 1990); see also Hale v. United States Dep't of Justice, 973 F.2d 894, 902-03 (10th Cir. 1992) (information concerning security devices, modus operandi and polygraph matters), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 392 n.5, 393 n.6 (W.D.N.Y. 1992) (fact of whether alien's name is listed in INS Lookout Book and methods of apprehension); McCoy v. Moschella, No. 89-2155, slip op. at 9-10 (D.D.C. Sept. 30, 1991) (categorization of similar bank robberies for purposes of subject identification); Ellis v. United States Dep't of Justice, No. 90-132, slip op. at 4 (D.D.C. Sept. 25, 1990) (FBI polygraph material).

[13] Martinez v. FBI, No. 82-1547, slip op. at 16 (D.D.C. Oct. 11, 1983); see, e.g., Neill v. United States Dep't of Justice, No. 91-3319, slip op. at 7-8 (D.D.C. July 20, 1993) ("known techniques used in conjunction with unknown techniques"); Hassan v. FBI, No. 91-2189, slip op. at 8-10 (D.D.C. July 13, 1992) (common techniques used with uncommon technique to achieve unique investigative goal), summary affirmance granted, No. 92-5318 (D.C. Cir. Mar. 17, 1993); Coleman v. FBI, No. 89-2773, slip op. at 26 (D.D.C. Dec. 10, 1991) (while techniques themselves may be known, disclosure of specific use or patterns of use reduces future effectiveness), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 12 (D.D.C. 1991) (disclosure of information within context of documents at issue could alert subjects of investigation about techniques used to aid FBI); Varelli v. FBI, No. 88-1865, slip op. at 17 (D.D.C. Oct. 4, 1991) (routine techniques protected when used with uncommon technique to accomplish unique investigative goal); Wagner v. FBI, No. 90-1314, slip op. at 5 (D.D.C. June 4, 1991) (exemption protects detailed surveillance and undercover investigative methods and techniques), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); D'Alessandro v. United States Dep't of Justice, No. 90-2088, slip op. at 8 (D.D.C. Feb. 28, 1991) (certain known investigative techniques, when used in conjunction with other techniques, could reasonably be expected to risk circumvention of law); PHE, Inc. v. United States Dep't of Justice, No. 90-1461, slip op. at 7 (D.D.C. Jan. 31, 1991) (descriptions of even commonly known obscenity investigation techniques pro-
(continued...)

EXEMPTION 7(E)

In some cases, it is not possible to describe secret law enforcement techniques, even in general terms, without disclosing the very information to be withheld.[14] Several recent decisions, though, have described the general nature of the technique while withholding the details.[15] Numerous cases decided

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[13](...continued)
tected when they are used "in concert with other elements of an investigation and in their totality [are] directed toward a specific investigative goal"), aff'd in pertinent part, rev'd in other part & remanded, 983 F.2d 248 (D.C. Cir. 1993); Beck v. United States Dep't of the Treasury, No. 88-493, slip op. at 26 (D.D.C. Nov. 8, 1989) (certain documents, including map, withheld because disclosure would reveal surveillance technique used by Customs Service, as well as why certain individuals were contacted with regard to investigations), aff'd, 946 F.2d 1563 (D.C. Cir. 1992) (table cite); Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 8 (D.D.C. Oct. 25, 1988) (protecting investigative techniques used in particular investigations, and their effectiveness ratings, which could assist criminals in employing countermeasures to circumvent these techniques); accord Dettman v. United States Dep't of Justice, No. 82-1108, slip op. at 14 (D.D.C. Mar. 21, 1985), aff'd, 802 F.2d 1472, 1475 n.4 (D.C. Cir. 1986); see also FOIA Update, Spring 1984, at 5; cf. United States v. Van Horn, 789 F.2d 1492, 1508 (11th Cir. 1986) ("Disclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance.") (recognizing qualified privilege in criminal case).

[14] See, e.g., Engelking v. DEA, No. 91-165, slip op. at 10 (D.D.C. Nov. 30, 1992) (release of two specific DEA techniques "would make them ineffective by allowing drug violators to evade detection and apprehension"); Soto v. DEA, No. 90-1816, slip op. at 7 (D.D.C. Apr. 13, 1992) (detailed description of technique pertaining to detection of drug traffickers would effectively disclose it); Fitzgibbon v. United States Secret Serv., No. 86-1886, slip op. at 3 (D.D.C. Mar. 17, 1992) (descriptions of how certain law enforcement investigations are conducted and "Administrative Profile" forms); Rojem v. United States Dep't of Justice, No. 90-3021, slip op. at 2 (D.D.C. Oct. 31, 1991) (critical descriptions and chronologies of law enforcement tactics not known to public); Martorano v. FBI, No. 89-377, slip op. at 20-21 (D.D.C. Sept. 30, 1991) (narcotics investigation techniques not commonly known to public); Spirovski v. DEA, No. 90-1633, slip op. at 6 (D.D.C. July 24, 1991) (details regarding three specific DEA investigative techniques); Fernandez v. United States Dep't of Justice, No. 88-1539, slip op. at 8 (D.D.C. Feb. 5, 1990) (accepting DEA claim that "at least three proven techniques and procedures not commonly known to the public" could not be explained without revealing their substance or risking integrity of their effectiveness); Lam Lek Chong v. DEA, No. 85-3726, slip op. at 19-20 (D.D.C. Mar. 14, 1988), aff'd on other grounds, 929 F.2d 729 (D.C. Cir. 1991).

[15] See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Becker v. IRS, No. 91-C-1203, slip op. at 14-15 (N.D. Ill. Mar. 27, 1992) (protects investigatory techniques used by IRS (continued...)

before the 1986 amendments are consistent with current case law in allowing agencies to describe the general nature of the technique while withholding full detail.[16]

While the former version of Exemption 7(E) protected law enforcement techniques and procedures only where they could be regarded as "investigatory" or "investigative" in character, the first clause of the amended Exemption 7(E) no longer contains that limitation. Rather, it now simply covers "techniques and procedures for law enforcement investigations and prosecutions."[17] As

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[15](...continued)
to identify and investigate tax protestors) (appeal pending); Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 15 (D.P.R. Sept. 22, 1988) (technique for examining records of alcoholic beverage retailers "to determine whether discounts offered by a wholesale liquor dealer were used as a subterfuge for the giving of a thing of value to the retailer"); O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988) ("tolerance and criteria used internally by the IRS in investigations"); Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 7-8 (D.D.C. July 12, 1988) ("reason codes" and "source codes" in State Department "lookout notices"); Luther v. IRS, No. 5-86-130, slip op. at 3-4 (D. Minn. June 8, 1987) (magistrate's recommendation) (alternative holding) ("IRS's Discriminant Function Scores" used to select returns for audit), adopted (D. Minn. Aug. 13, 1987).

[16] See, e.g., Cohen v. Smith, No. 81-5365, slip op. at 8 (9th Cir. Mar. 25, 1983) (details of telephone interviews), cert. denied, 464 U.S. 939 (1983); Ray v. United States Customs Serv., No. 83-1476, slip op. at 16-17 (D.D.C. Jan. 28, 1985) (same); Fund for a Conservative Majority v. Federal Election Comm'n, No. 84-1342, slip op. at 6-8 (D.D.C. Feb. 26, 1985) (alternative holding) (audit criteria); Oliva v. FBI, No. 83-3724, slip op. at 4 (D.D.C. Mar. 30, 1984) (model, serial number and type of equipment used in connection with surveillance); LeClair v. United States Secret Serv., No. 82-2162, slip op. at 5 (D. Mass. Feb. 23, 1983) ("Administrative Profile" used to evaluate individuals in connection with protective services); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 413-14 (D.D.C. 1983) (alternative holding) (computer program used to detect anti-dumping law violations); Minnesota v. Department of Energy, No. 4-81-434, slip op. at 10 (D. Minn. Dec. 14, 1982) (details of techniques utilized in oil refinery audit); Hayward v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 81,231, at 81,646 (D.D.C. July 14, 1981) (methods and techniques used by U.S. Marshals Service to relocate protected witnesses); Malloy v. United States Dep't of Justice, 457 F. Supp. at 545 (details concerning "bait money" and "bank security devices"); Boyce v. Deputy Director, No. 78-084, slip op. at 4-5 (D.D.C. Oct. 25, 1978) (procedures unique to counterfeiting investigations); Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976) (laboratory techniques used in arson investigation); see also U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 7 (D.D.C. Mar. 26, 1986) (extending former version of Exemption 7(E) to protect even Secret Service's contract specifications for President's armored limousine).

[17] 5 U.S.C. § 552(b)(7)(E) (1988).

such, it authorizes the withholding of information consisting of, or reflecting, a law enforcement "technique" or a law enforcement "procedure," wherever it is "for law enforcement investigations or prosecutions" generally.[18]

The protection now available under this first clause of the exemption is thus broader than that which formerly was available under Exemption 7(E) as a whole.[19] One of the Exemption 7 weaknesses specifically addressed by Congress in achieving FOIA reform was its inadequacy to protect such records as law enforcement manuals which, though certainly containing law enforcement "techniques" and "procedures," ran afoul of the former "investigatory" requirement of the exemption.[20] Such documents, including those which pertain to the "prosecutions" stage of the law enforcement process, now meet the requirements for withholding under Exemption 7(E) to the extent that they consist of, or reflect, law enforcement techniques and procedures best kept confidential.[21]

Exemption 7(E)'s entirely new second clause separately protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law."[22] This distinct new protection was added by Congress to ensure proper protection for the type of law enforcement guideline information found ineligible to be withheld in the en banc decision of the Court of Appeals for the District of Columbia Circuit in Jordan v. Department of Justice,[23] a case involving guidelines for prosecutions. It reflects a dual concern with the need to remove any lingering effect of that decision, while at the same time ensuring that agencies do not unnecessarily maintain "secret law" on the standards used to regulate behavior.[24]

Accordingly, this clause of Exemption 7(E) is available to protect any "law enforcement guideline" information of the type involved in Jordan, whether it pertains to the prosecution or basic investigation stage of a law enforcement matter, whenever it is determined that its disclosure "could reasonably be

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[18] Id.; see Attorney General's Memorandum at 15. But see also Cowsen-El v. United States Dep't of Justice, 826 F. Supp. 532, 533-34 (D.D.C. 1992) (Bureau of Prisons Program Statement held internal policy wholly unrelated to investigations or prosecutions).

[19] See Attorney General's Memorandum at 16.

[20] See S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983) (citing, e.g., Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979)).

[21] Attorney General's Memorandum at 16.

[22] 5 U.S.C. § 552(b)(7)(E) (1988).

[23] 591 F.2d 753, 771 (D.C. Cir. 1978).

[24] S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983). See Attorney General's Memorandum at 16-17; see also Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. at 200 & n.1 (shrouding safety rating process in secrecy "is not an acceptable solution to the agency's proper concern over severe budgetary restrictions").

expected to risk circumvention of the law."[25] In choosing this particular harm formulation, Congress employed the more relaxed harm standard now used widely throughout Exemption 7, and obviously "was guided by the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision"[26] in Crooker v. Bureau of Alcohol, Tobacco & Firearms.[27] However, in applying this clause of Exemption 7(E) to law enforcement manuals, agencies should be careful to withhold only the portions of those guidelines that correlate to a specific harm to law enforcement efforts.[28]

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[25] See, e.g., PHE, Inc. v. United States Dep't of Justice, 983 at 251 (D.C. Cir. 1993) ("release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts"); Silber v. United States Dep't of Justice, No. 91-876, transcript at 25 (D.D.C. Aug. 13, 1992) (bench order) (disclosure of agency's monograph on fraud litigation "would present the specter of circumvention of the law"); Small v. IRS, 820 F. Supp. 163, 165-66 (D.N.J. 1992) (disclosure of "IRS's Discriminant Function Scores" would result in circumvention of tax laws; IRS tolerance and audit guidelines withheld because disclosure would allow taxpayers to devise circumvention strategies); Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 14 (D.D.C. Dec. 19, 1990) (exemption protects final contingency plan in event of attack on United States, guidelines for response to terrorist attacks, and contingency plans for immigration emergencies); Powell v. United States Dep't of Justice, No. 86-2020, slip op. at 18 (D.D.C. Aug. 18, 1988) (magistrate's recommendation) (although agency released documents describing various enforcement techniques, disclosure of specific technique used in particular case would reveal agency's strategy in similar cases), adopted (D.D.C. Oct. 31, 1989); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, No. 88-592, slip op. at 4-5 (D.D.C. Apr. 17, 1989) (finding portions of FERC regulatory audit describing (1) significance of each page in audit report, (2) investigatory technique utilized and (3) auditor's conclusions, to constitute "the functional equivalent of a manual of investigative techniques"). But see Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) (IRS did not establish how release of notes and memoranda "regarding harassment of Service employees" written during course of investigation "could reasonably be expected to circumvent the law") (appeal pending).

[26] S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983); see Attorney General's Memorandum at 17.

[27] 670 F.2d 1051 (D.C. Cir. 1981).

[28] See PHE, Inc. v. United States Dep't of Justice, 983 F.2d at 252 (National Obscenity Enforcement Unit failed to submit affidavit containing "precise descriptions of the nature of the redacted material and providing reasons why releasing each withheld section would create a risk of circumvention of the law, or . . . clearly indicat[ing] why disclosable material could not be segregated from exempted material"); cf. Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 982-83 (1st Cir. 1985) (remanding for determination of segregability) (Exemption 2); Schreibman v. United States Dep't of Com-

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Law enforcement agencies therefore may avail themselves of the distinct protections now provided in Exemption 7(E)'s two clauses. Their "noninvestigatory" law enforcement records, to the extent that they can be fairly regarded as reflecting techniques or procedures, are now entitled to categorical protection under Exemption 7(E)'s expanded first clause. As well, law enforcement guidelines that satisfy the broad "could reasonably be expected to risk circumvention of law" standard can be protected under Exemption 7(E)'s newer second clause.[29] (See also discussion of overlapping "circumvention" protection available under Exemption 2, above.)

EXEMPTION 7(F)

As a result of the Freedom of Information Reform Act of 1986,[1] Exemption 7(F) now permits the withholding of information necessary to protect the physical safety of a wide range of individuals. Whereas Exemption 7(F) previously protected records that "would . . . endanger the life or physical safety of law enforcement personnel,"[2] the amended exemption provides protection to "any individual" where disclosure of information about him "could reasonably be expected to endanger [his] life or physical safety."[3]

Prior to the 1986 FOIA amendments, this exemption had been invoked to protect both federal and local law enforcement officers.[4] Cases decided after the 1986 FOIA amendments continue this strong protection for law enforcement agents.[5] Under the amended language of Exemption 7(F), courts have applied

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[28](...continued)
merce, 785 F. Supp. 164, 166 (D.D.C. 1991) (remanding for segregability finding involving vulnerability assessment) (Exemption 2).

[29] See Attorney General's Memorandum at 17 & n.31.

[1] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49.

[2] 5 U.S.C. § 552(b)(7)(F) (1982) (amended 1986).

[3] 5 U.S.C. § 552(b)(7)(F) (1988).

[4] See, e.g., Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (FBI special agents and "other law enforcement personnel"); Barham v. Secret Serv., No. 82-2130, slip op. at 5 (W.D. Tenn. Sept. 13, 1982) (Secret Service agents); Docal v. Bennsinger, 543 F. Supp. 38, 48 (M.D. Pa. 1981) (DEA special agents, supervisory special agents, and local law enforcement officers); Mahler v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,032, at 82,263 (D.D.C. Sept. 29, 1981) (Deputy U.S. Marshal); Nunez v. DEA, 497 F. Supp. 209, 212 (S.D.N.Y. 1980) (DEA special agents); Ray v. Turner, 468 F. Supp. 730, 735 (D.D.C. 1979) (U.S. Customs Service agent).

[5] See, e.g., Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. June 28, 1993) (names, identifying data, and aliases of local undercover law enforcement officers); Manchester v. DEA, 823 F. Supp. 1259, (continued...)

the broader protection now offered by this exemption. They have held that this exemption is appropriate to withhold the "names and identifying information of federal employees, and third persons who may be unknown" to the requester.[6] Withholding of such information can be necessary to protect such persons from

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[5](...continued)
1273 (E.D. Pa. 1993) (names and identities of DEA special agents, supervisory special agents, and other law enforcement officers); Engelking v. DEA, No. 91-165, slip op. at 10 (D.D.C. Nov. 30, 1992) (same); Watson v. United States Dep't of Justice, 799 F. Supp. 193, 197 (D.D.C. 1992) (same); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 795 (D.D.C. 1992) (same), summary affirmance granted in pertinent part, No. 92-5360 (D.C. Cir. Apr. 29, 1993); Soto v. DEA, No. 90-1816, slip op. at 8 (D.D.C. Apr. 13, 1992) (same); Martorano v. DEA, No. 89-813, slip op. at 21-22 (D.D.C. Sept. 30, 1991) (identities of DEA agents and other law enforcement personnel who associate with violators in undercover capacities); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 11 (D.D.C. 1991) (identities of DEA law enforcement personnel); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 2-3 (D.D.C. July 24, 1991) (names mentioned in criminal investigative files), summary affirmance granted in pertinent part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); Spirovski v. DEA, No. 90-1633, slip op. at 4 (D.D.C. July 24, 1991) (names, telephone numbers and addresses of DEA personnel); Wagner v. FBI, No. 90-1314, slip op. at 6 (D.D.C. June 4, 1991) (identities of DEA agents who routinely operate in undercover narcotics investigations), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); Clarkson v. IRS, No. 8:88-3036-3K, slip op. at 7-8 (D.S.C. May 10, 1990) (identities of IRS agents who participated in undercover operations involving violent tax-protester groups); Atkins v. Department of Justice, No. 88-842, slip op. at 10 (D.D.C. Feb. 26, 1990) (names and identities of DEA agents and other law enforcement personnel who associate with violators in undercover capacities), aff'd, 946 F.2d 1563 (D.C. Cir. 1991) (table cite).

[6] Luther v. IRS, No. 5-86-130, slip op. at 6 (D. Minn. Aug. 13, 1987); see also Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 11 (D.D.C. Aug. 17, 1993) (given requester's past violent behavior, agency can protect identities of individuals who assisted FBI in its case against requester); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 810 (D.N.J. 1993) (release of FBI reports would endanger life or physical safety of victims, informants, and potential and actual witnesses); Kele v. United States Parole Comm'n, No. 92-1302, slip op. at 3 (D.D.C. Aug. 18, 1992) (agency can withhold adverse witness's address and also statements concerning his involvement with requester and willingness to testify at requester's probation hearing); Sanders v. United States Dep't of Justice, No. 91-2263, slip op. at 10 (D. Kan. Apr. 21, 1992) (in view of requester's mental difficulties, disclosing identities of medical personnel who prepared requester's mental health records would endanger their safety); Author Servs., Inc. v. IRS, No. 90-2187, slip op. at 7 (C.D. Cal. Nov. 14, 1991) (identities of third parties and handwriting and identities of IRS employees withholdable in view of previous conflict and hostility between parties); Varelli v. FBI, No. 88-1865, slip op. at 17 (D.D.C. Oct. 4, 1991) (identities of individuals in El Salvador who knew of requester's relationship with FBI protected).

possible harm by a requester who has threatened them in the past.[7] More recently, courts have held that the expansive language of "any individual" encompasses protection of the identities of informants who have been threatened with harm.[8]

Significantly, Exemption 7(F) protection has been held to remain applicable even after a law enforcement officer subsequently retired.[9] On the other hand, in one instance it was held that Exemption 7(F) could not be employed to protect the identities of law enforcement personnel who testified at the requester's criminal trial.[10]

Several years ago, one court approved a rather novel, but certainly appropriate, application of this exemption to a description in an FBI laboratory report of a homemade machine gun because its disclosure would create the real possibility that law enforcement officers would have to face "individuals armed with homemade devices constructed from the expertise of other law enforcement people."[11]

Although Exemption 7(F)'s coverage may in large part be duplicative of that afforded by Exemption 7(C), it is potentially broader in that no balancing is required for withholding under Exemption 7(F).[12] It is difficult to imagine any circumstance, though, in which the public's interest in disclosure could outweigh the safety of any individual. Moreover, Exemption 7(F), as amended, should be of greater utility to law enforcement agencies, given the lessened

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[7] See, e.g., Luther v. IRS, slip op. at 6; Durham v. United States Dep't of Justice, slip op. at 11 (protection for third parties who have knowledge about crime in which requester was involved); Manna v. United States Dep't of Justice, 815 F. Supp. at 810 (victims, informants, and potential and actual witnesses in La Cosa Nostra case protected).

[8] See, e.g., Housley v. FBI, No. 87-3231, slip op. at 7 (D.D.C. Mar. 18, 1988) (identities of informants); see also Spirovski v. DEA, slip op. at 4 (names, telephone numbers and addresses of informants).

[9] See Moody v. DEA, 592 F. Supp. 556, 559 (D.D.C. 1984).

[10] Myers v. United States Dep't of Justice, No. 85-1746, slip op. at 6 (D.D.C. Sept. 22, 1986). Contra Beck v. United States Dep't of Justice, slip op. at 2-3 (exemption not necessarily waived when information revealed at public trial); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 6 (D.D.C. Apr. 13, 1989) (similar to protection under Exemption 7(C), DEA agents' identities protected even though they testified at trial), aff'd, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

[11] LaRouche v. Webster, No. 75-6010, slip op. at 24 (S.D.N.Y. Oct. 23, 1984); see also Pfeffer v. Director, Bureau of Prisons, No. 89-899, slip op. at 4 (D.D.C. Apr. 18, 1990) (information about smuggling weapons into prisons could reasonably be expected to endanger physical safety of "some individual" and therefore was properly withheld under Exemption 7(F)).

[12] See FOIA Update, Spring 1984, at 5.

"could reasonably be expected" harm standard now in effect.[13] Agencies can reasonably infer from this modification Congress' approval to withhold information wherever there is a reasonable likelihood of its disclosure causing harm to someone.[14]

EXEMPTION 8

Exemption 8 of the FOIA covers matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[1]

This exemption received little judicial attention during the first dozen years of the FOIA's operation. The only significant decision during that period was one which held that national securities exchanges and broker-dealers are not "financial institutions" within the meaning of the exemption.[2] With respect to stock exchanges, which have been held to constitute "financial institutions" under Exemption 8, that decision has not been followed.[3]

Subsequent courts interpreting Exemption 8 have declined to restrict the "particularly broad, all-inclusive" scope of the exemption.[4] They have reasoned that "if Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not our function, even in the FOIA

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[13] See, e.g., Simpson v. United States Dep't of Justice, No. 87-2832, slip op. at 11 (D.D.C. Sept. 30, 1988) (need to protect identities of DEA agents held so "clear" that in camera review unnecessary); cf. Hoch v. CIA, No. 82-754, slip op. at 3 (D.D.C. Sept. 30, 1988) ("disclosures by the congressional committees did not purport to be official acknowledgements as to any of the information" sought), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (table cite).

[14] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act at 18 & n.34 (Dec. 1987); see also, e.g., Dickie v. Department of the Treasury, No. 86-649, slip op. at 13 (D.D.C. Mar. 31, 1987) (upholding application of Exemption 7(F) as amended based upon agency judgment of "very strong likelihood" of harm).

[1] 5 U.S.C. § 552(b)(8) (1988).

[2] M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 470 (D.D.C. 1972).

[3] See Mermelstein v. SEC, 629 F. Supp. 672, 673-75 (D.D.C. 1986) (opinion based in part upon legislative history of Sunshine Act).

[4] Consumers Union of United States, Inc. v. Office of the Comptroller of the Currency, No. 86-1841, slip op. at 2 (D.D.C. Mar. 11, 1988); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,194, at 80,494 (D.D.C. July 28, 1980).

context, to subvert that effort."[5] The Court of Appeals for the District of Columbia Circuit has gone so far as to state that in Exemption 8 Congress has provided "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."[6] More recently, in a major Exemption 8 decision, the D.C. Circuit broadly construed the term "financial institutions" and held that it is not limited to "depository" institutions.[7]

In examining the sparse legislative history of Exemption 8, courts have discerned two major purposes underlying it: (1) "to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability," and (2) "to promote cooperation and communication between employees and examiners."[8] Accordingly, different types of documents have been held to fall within the broad confines of Exemption 8. First and foremost, the authority of federal agencies to withhold bank examination reports prepared by federal bank examiners has not been questioned.[9] Further, matters that are "related to" such reports--that is, documents that "represent the foundation of the examination process, the findings of such an examination, or its follow-up"--have also been held exempt from disclosure.[10] Likewise, Exemption 8 has been employed to withhold portions of documents--such as internal memoranda and policy statements--that contain specific information

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[5] Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978); see also Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) ¶ 81,107, at 81,270 (D.D.C. Jan. 28, 1981); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,494.

[6] Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980); see also Public Citizen v. Farm Credit Admin., 938 F.2d 290, 293-94 (D.C. Cir. 1991) (holding that National Consumer Cooperative Bank is "financial institution" for purposes of Exemption 8; exemption protects audit reports prepared by Farm Credit Administration for submission to Congress regarding NCCB, although FCA does not regulate or supervise NCCB).

[7] Public Citizen v. Farm Credit Admin., 938 F.2d at 292-94.

[8] Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,034, at 80,102 (D.D.C. Feb. 13, 1980); see also Consumers Union of United States, Inc. v. Heimann, 589 F.2d at 534; Feinberg v. Hibernia Corp., No. 90-4245, slip op. at 8 (E.D. La. Jan. 7, 1993); Fagot v. FDIC, 584 F. Supp. 1168, 1173 (D.P.R. 1984), aff'd in pertinent part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (table cite).

[9] See Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) at 81,270; Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,102.

[10] Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,102; see also Teichgraeber v. Board of Governors, Fed. Reserve Sys., No. 87-2505, slip op. at 2-3 (D. Kan. Mar. 20, 1989); Consumers Union of United States, Inc. v. Office of the Comptroller of the Currency, slip op. at 2-3; Folger v. Conover, No. 82-4, slip op. at 6-8 (E.D. Ky. Oct. 25, 1983); Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) at 81,271.

about named financial institutions.[11]

Bank examination reports and related documents prepared by state regulatory agencies have been found protectible under Exemption 8 on more than one ground. The purposes of the exemption are plainly served by withholding such material because of the "interconnected" purposes and operations of federal and state banking authorities.[12] A state agency report transferred to a federal agency strictly for its confidential use, however, and thus still within the control of the state agency, was held as a threshold matter not even to be an "agency record" under the FOIA subject to disclosure.[13] In general, "all records, regardless of the source, of a bank's financial condition and operations and in the possession of a federal agency 'responsible for the regulation or supervision of financial institutions,' are exempt."[14]

Indeed, even records pertaining to banks that are no longer in operation can be withheld under Exemption 8 in order to serve the policy of promoting "frank cooperation" between bank and agency officials.[15] The exemption protects even bank examination reports and related memoranda relating to insolvency proceedings.[16] Documents relating to cease-and-desist orders that issue after a bank examination as the result of a closed administrative hearing are also properly exempt.[17] Additionally, reports examining bank compliance with consumer laws and regulations have been held to "fall squarely within the exemption."[18]

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[11] See Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. at 19-20, 23, 26-28, 30, 33 (M.D. Tenn. Nov. 20, 1990) (protecting portions of documents that contain specific information about two named financial institutions--names of institutions, names of officers and agents, any references to their geographic locations, and specific information about their financial conditions).

[12] See Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,102.

[13] McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,495.

[14] Id. (quoting legislative history).

[15] Gregory v. FDIC, 631 F.2d at 899.

[16] See, e.g., Tripati v. United States Dep't of Justice, No. 87-3301, slip op. at 2-3 (D.D.C. May 23, 1990). But cf. In re Sunrise Sec. Litig., 109 B.R. 658, 664-67 (E.D. Pa. 1990) (holding that Federal Home Loan Bank of Atlanta could not rely upon regulation implementing Exemption 8 as independent evidentiary "bank examination privilege," and even under more general "official information privilege" there exists no absolute protection for internal working papers and other documents generated in government's examination of failed bank) (non-FOIA case).

[17] See, e.g., Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,103.

[18] Id.; cf. Consumers Union of United States, Inc. v. Heimann, 589 F.2d at (continued...)

Moreover, in keeping with the expansive construction of Exemption 8, courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial state of the institution: "[A]n entire examination report, not just that related to the 'condition of the bank' may be properly withheld."[19]

EXEMPTION 9

Exemption 9 of the FOIA covers "geological and geophysical information and data, including maps, concerning wells."[1] While this exemption is very rarely invoked or interpreted,[2] one court has held that it applies only to "well information of a technical or scientific nature."[3] Only two other decisions have addressed Exemption 9; however, both merely mentioned the exemption without discussing its scope or application.[4]

EXCLUSIONS

The Freedom of Information Reform Act of 1986 created an entirely new mechanism for protecting certain especially sensitive law enforcement matters

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[18](...continued)
534-35 (Truth in Lending Act does not narrow Exemption 8's broad language); Consumers Union of United States, Inc. v. Office of the Comptroller of the Currency, slip op. at 2-3 (reports fall within Exemption 8 "because they analyze and summarize information concerning consumer complaints").

[19] Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) at 80,103. But see Fagot v. FDIC, No. 84-1523, slip op. at 5-6 (1st Cir. Mar. 27, 1985) (portion of document which does not relate to bank report or examination cannot be withheld); see generally PHE, Inc. v. Department of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (emphasizing general agency segregation obligation under FOIA).

[1] 5 U.S.C. § 552(b)(9) (1988).

[2] See National Broadcasting Co. v. SBA, No. 92 Civ. 6483, slip op. at 5 n.2 (S.D.N.Y. Jan. 28, 1993) (merely noting that document withheld under Exemption 4 "also contains geographic or geological information which is exempted from disclosure pursuant to FOIA Exemption 9").

[3] Black Hills Alliance v. United States Forest Serv., 603 F. Supp. 117, 122 (D.S.D. 1984) (excluding number, locations, and depths of proposed uranium exploration drill-holes).

[4] See Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 203-04 & n.20 (5th Cir. 1977) (non-FOIA case); Pennzoil Co. v. Federal Power Comm'n, 534 F.2d 627, 629-30 & n.2 (5th Cir. 1976) (non-FOIA case); cf. Ecee, Inc. v. Federal Energy Regulatory Comm'n, 645 F.2d 339, 348-49 (5th Cir. 1981) (requirement that producers of natural gas submit confidential geological information held valid) (non-FOIA case).

under new subsection (c) of the FOIA.[1] These three special protection provisions, referred to as record "exclusions," now expressly authorize federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to "treat the records as not subject to the requirements of [the FOIA]."[2] It should be appreciated at the outset, however, that the unfamiliar procedures required to properly employ these special record exclusions are by no means straightforward and must be implemented with the utmost care.[3] Any agency considering employing an exclusion or having a question as to their implementation should first consult with the Office of Information and Privacy, at (202) 514-3642.[4]

Initially, it is crucial to recognize the somewhat subtle, but very significant, distinction between the result of employing a record exclusion and the concept that is colloquially known as "Glomarization."[5] That latter term refers to the situation in which an agency expressly refuses to confirm or deny the existence of records responsive to a request.[6] (A more detailed discussion of "Glomarization" is set forth under Exemption 1, above.) The application of one of the three record exclusions, on the other hand, results in a response to the FOIA requester stating that there exist no records responsive to his FOIA request. While "Glomarization" remains adequate to provide necessary protection in certain situations, these special record exclusions should prove invaluable in addressing the exceptionally sensitive situations in which even "Glomarization" is inadequate to the task.

The (c)(1) Exclusion

The first of these novel provisions, known as the "(c)(1) exclusion," provides as follows:

> Whenever a request is made which involves access to records described in subsection (b)(7)(A) and -- (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere

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[1] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-30 (Dec. 1987) [hereinafter Attorney General's Memorandum].

[2] 5 U.S.C. § 552(c)(1), (c)(2), (c)(3) (1988).

[3] See Attorney General's Memorandum at 27 n.48.

[4] See id.

[5] See id. at 26 & n.47; see also Benavides v. DEA, 968 F.2d 1243, 1246-48 (D.C. Cir.) (initially confusing exclusion mechanism with "Glomarization"), modified, 976 F.2d 751, 753 (D.C. Cir. 1992).

[6] See, e.g., Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

> with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.[7]

In most cases, the protection of Exemption 7(A) is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA. To avail itself of Exemption 7(A), however, an agency must routinely specify that it is doing so--first administratively and then, if sued, in court--even when it is invoking the exemption to withhold all responsive records in their entireties. Thus, in specific situations in which the very fact of an investigation's existence is yet unknown to the investigation's subject, invoking Exemption 7(A) in response to a FOIA request for pertinent records permits an investigation's subject to be "tipped off" to its existence. By the same token, any person (or entity) engaged in criminal activities could use a carefully worded FOIA request to try to determine whether he (or it) is under federal investigation. An agency response that does not invoke Exemption 7(A) to withhold law enforcement files tells such a requester that his activities have thus far escaped detection.

The (c)(1) exclusion now authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from the FOIA's reach.[8] To qualify for such exclusion from the FOIA, the records in question must be those which would otherwise be withheld in their entireties under Exemption 7(A). Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law."[9] Hence, any records pertaining to a purely civil law enforcement matter cannot be excluded from the FOIA under this provision, although they may qualify for ordinary Exemption 7(A) withholding. However, the statutory requirement that there be only a "possible violation of criminal law," by its very terms, admits a wide range of investigatory files maintained by more than just criminal law enforcement agencies.[10]

Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency determining whether it can employ (c)(1) protection must consider whether it has "reason to believe" that the investigation's subject is not aware of its pendency and that, most fundamentally, the agency's disclosure of the very existence of the records in question "could reasonably be expected to

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[7] 5 U.S.C. § 552(c)(1).

[8] See Attorney General's Memorandum at 18-22.

[9] 5 U.S.C. § 552(c)(1)(A).

[10] See Attorney General's Memorandum at 20 & n.37 (files of agencies which are not primarily engaged in criminal law enforcement activities may be eligible for protection if they contain information about potential criminal violations which are pursued toward the possibility of referral to the Department of Justice for further prosecution).

interfere with enforcement proceedings."[11]

Obviously, where all investigatory subjects are already aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern. Accordingly, the language of this exclusion expressly obliges agencies contemplating its use to consider the level of awareness already possessed by the investigative subjects involved. It is appropriate that agencies do so, as the statutory language provides, according to a good-faith, "reason to believe" standard, which very much comports with the "could reasonably be expected to" standard utilized both elsewhere in this exclusion and in the amended language of Exemption 7(A).[12]

This "reason to believe" standard for considering a subject's present awareness should afford agencies all necessary latitude in making such determinations. As the exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively possesses "reason to believe" that such awareness does not in fact exist. While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, unless an agency can resolve that a subject is aware of an investigation, it should not risk impairing the investigation through a telling FOIA disclosure.[13] Moreover, agencies are not obligated to accept any bald assertions by investigative subjects that they "know" of ongoing investigations against them; such assertions might well constitute no more than sheer speculation. Because such a ploy, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.[14]

In the great majority of cases, invoking Exemption 7(A) will protect the interests of law enforcement agencies in responding to FOIA requests for active law enforcement files. The (c)(1) exclusion should be employed only in the exceptional case in which an agency reaches the judgment that, given its belief of subject unawareness, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm--a judgment that should be made distinctly and thoughtfully.[15]

Finally, the clear language of this exclusion specifically restricts its applicability to "during only such time" as the above required circumstances continue to exist. This limitation comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it. It means, of course, that an agency that has employed the exclusion in a particular case is obligated to cease doing so once the circumstances warranting it cease to exist. Once a law enforcement matter

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[11] 5 U.S.C. § 552(c)(1)(B).

[12] See Attorney General's Memorandum at 21.

[13] See id.

[14] See id. at n.38.

[15] See id. at 21.

reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no longer applicable. If the FOIA request which triggered the agency's use of the exclusion remains pending either administratively or in court at such time, the excluded records should be identified as responsive to that request and processed in the ordinary manner.[16] However, an agency is under no legal obligation to spontaneously reopen a closed FOIA request, even though records were excluded during its entire pendency: By operation of law, the records simply were not subject to the FOIA during the pendency of the request.[17]

Where all of these requirements are met, and an agency reaches the judgment that it is necessary and appropriate that the (c)(1) exclusion be employed in connection with a request, this means that the records in question will be treated, as far as the FOIA requester is concerned, as if they did not exist.[18] Where it is the case that the excluded records are just part of the totality of records responsive to a FOIA request, the request will be handled as a seemingly routine one, with the other responsive records processed as if they were the only responsive records in existence. Where the only records responsive to a request fall within the exclusion, the requester will lawfully be advised that no records responsive to his FOIA request exist.[19]

In order to maintain the integrity of an exclusion, each agency that employs it must ensure that its FOIA responses are consistent throughout. Therefore, all agencies that could possibly employ at least one of the three record exclusions should ensure that their FOIA communications are consistently phrased so that a requester cannot ever discern the existence of any excluded records, or of any matter underlying them, through the agency's response to his FOIA request.

The (c)(2) Exclusion

The second exclusion created by the FOIA Reform Act applies to a narrower situation, involving the threatened identification of confidential informants in criminal proceedings.[20] The "(c)(2) exclusion" provides as follows:

> Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject

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[16] See id. at 22.

[17] See id. at 22 n.39.

[18] See id. at 22.

[19] Id.

[20] See id. at 22-24.

> to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed.[21]

This exclusion contemplates the situation in which a sophisticated requester could try to identify an informant by forcing a law enforcement agency into a position in which it otherwise would have no lawful choice but to tellingly invoke Exemption 7(D) in response to a request which encompasses informant records maintained on a named person.[22] In the ordinary situation, Exemption 7(D), as now amended, should adequately allow a law enforcement agency to withhold all items of information necessary to prevent the identification of any of its confidential sources.[23]

But as with Exemption 7(A), invoking Exemption 7(D) in response to a FOIA request tells the requester that somewhere within the records encompassed by his particular request there is reference to at least one confidential source. Again, under ordinary circumstances the disclosure of this fact poses no direct threat. But under certain extraordinary circumstances, this disclosure could result in devastating harms to the source and to the system of confidentiality existing between sources and criminal law enforcement agencies.

The scenario in which the exclusion is most likely to be employed is one in which the ringleaders of a criminal enterprise suspect that they have been infiltrated by a source and therefore force all participants in the criminal venture either to directly request that any law enforcement files on them be disclosed to the organization or to execute privacy waivers authorizing disclosure of their files in response to a request from the organization. Absent the (c)(2) exclusion, a law enforcement agency could effectively be forced to disclose information to the subject organization (i.e., through the very invocation of Exemption 7(D)) indicating that the named individual is a confidential source.[24]

The (c)(2) exclusion is principally intended to address this unusual, but dangerous situation by permitting an agency to escape the necessity of giving a response that would be tantamount to identifying a named party as a law enforcement source.[25] Any criminal law enforcement agency is now authorized to treat such requested records, within the extraordinary context of such a FOIA

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[21] 5 U.S.C. § 552(c)(2).

[22] See Attorney General's Memorandum at 23.

[23] See, e.g., Keys v. United States Dep't of Justice, 830 F.2d 337, 345-46 (D.C. Cir. 1987); see also United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2023-24 (1993) (although "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation," it should "often" be able to identify circumstances supporting an inference of confidentiality).

[24] See Attorney General's Memorandum at 23.

[25] See id. at 23-24.

request, as beyond the FOIA's reach. As with the (c)(1) exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request."[26]

A criminal law enforcement agency forced to employ this exclusion should do so in the same fashion as it would employ the (c)(1) exclusion already discussed.[27] It is imperative that all information which ordinarily would be disclosed to a first-party requester, other than information which would reflect that an individual is a confidential source, be disclosed. If, for example, the Federal Bureau of Investigation were to respond to a request for records pertaining to an individual having a known record of federal prosecutions by replying that "there exist no records responsive to your FOIA request," the interested criminal organization would surely recognize that its request had been afforded extraordinary treatment and would draw its conclusions accordingly. Therefore, the (c)(2) exclusion must be employed in a manner entirely consistent with its source-protection objective.

The (c)(3) Exclusion

The third of these special record exclusions pertains only to certain law enforcement records that are maintained by the FBI.[28] The "(c)(3) exclusion" provides as follows:

> Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].[29]

This exclusion recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence and the battle against international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests. Sometimes, within the context of a particular FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classified in accordance with Executive Order No. 12,356 and protectible under FOIA Exemption 1.[30] Once again, however, the mere invocation of Exemption 1 to withhold such information can provide information to the requester which would have an extremely adverse effect on the government's interests. In some possible contexts, the furnishing of an

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[26] S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983).

[27] See Attorney General's Memorandum at 24.

[28] See id. at 24-27.

[29] 5 U.S.C. § 552(c)(3).

[30] 5 U.S.C. § 552(b)(1); see Attorney General's Memorandum at 25.

actual "no records" response, even to a seemingly innocuous "first-party" request, can compromise sensitive activities.[31]

The FOIA Reform Act took cognizance of this through the (c)(3) exclusion, in which it authorizes the FBI to protect itself against such harm in connection with any of its records pertaining to these three, especially sensitive, areas. To do so, the FBI must of course reach the judgment, in the context of a particular request, that the very existence or nonexistence of responsive records is itself a classified fact and that it need employ this record exclusion to prevent its disclosure.[32] By the terms of this provision, the excluded records may be treated as such so long as their existence, within the context of the request, "remains classified information."[33]

Additionally, it should be noted that while the statute refers to records maintained by the FBI, exceptional circumstances could possibly arise in which it would be appropriate for another component of the Department of Justice or another federal agency to invoke this exclusion.[34] Such a situation could occur where information in records of another component or agency is derived from FBI records which fully qualify for (c)(3) exclusion protection. In such extraordinary circumstances, the agency processing the derivative information should consult with the FBI regarding the possible joint invocation of the exclusion in order to avoid a potentially damaging inconsistent response.[35]

Procedural Considerations

Several procedural considerations regarding the implementation and operation of these special record exclusions should be noted. First, it should be self-evident that the decision to employ an exclusion in response to a particular request must not be reflected on anything made available to the requester. Where an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is reviewed carefully by appropriate supervisory agency officials.[36] The particular records covered by an exclusion action should be concretely and carefully identified and segregated from any responsive records that are to be processed according to ordinary procedures.[37]

It must be remembered that providing a "no records" response as part of an exclusion strategy does not insulate the agency from either administrative or

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[31] See Attorney General's Memorandum at 25.

[32] See id.

[33] 5 U.S.C. § 552(c)(3).

[34] See Attorney General's Memorandum at 25 n.45.

[35] See id.

[36] See id. at 27.

[37] See id.

judicial review of the agency's action. The recipient of a "no records" response may challenge it because he believes that the agency has failed to conduct a sufficiently detailed search to uncover the requested records.[38] Alternately, any requester, mindful of the exclusion mechanism and seeking information of a nature which could possibly trigger an exclusion action, could seek review in an effort to pursue his suspicions and to have a court determine whether an exclusion, if in fact used, was appropriately employed.

Moreover, because the very objective of the exclusions is to preclude the requester from learning that there exist such responsive records, all administrative appeals and court cases involving a "no records" response must now receive extremely careful attention. If one procedure is employed in adjudicating appeals or litigating cases in which there are genuinely no responsive records, and any different course is followed where an exclusion is in fact being used, sophisticated requesters could quickly learn to distinguish between the two and defeat an exclusion's very purpose.[39]

Consequently, agencies should prepare in advance a uniform procedure to handle administrative appeals and court challenges which seek review of the possibility that an exclusion was employed in a given case. In responding to administrative appeals from "no record" responses,[40] agencies should accept any clear request for review of the possible use of an exclusion and specifically address it in evaluating and responding to the appeal.[41]

In the exceptional case in which an exclusion was in fact invoked, the appellate review authority should examine the correctness of that action and come to a judgment as to the exclusion's continued applicability as of that time.[42] In the event that an exclusion is found to have been improperly employed or to be no longer applicable, the appeal should be remanded for prompt processing of all formerly excluded records, with the requester advised accordingly.[43] Where it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should be, by all appearances, the same: The requester should be specifically advised that this aspect of his appeal was

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[38] See id. at 29; see generally Oglesby v. United States Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990).

[39] See Attorney General's Memorandum at 29.

[40] See FOIA Update, Spring 1991, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (agencies now obligated to advise any requester who receives "no record" response of its procedures for filing administrative appeal) (superseding FOIA Update, Summer 1984, at 2).

[41] See Attorney General's Memorandum at 29 (superseded in part by FOIA Update, Spring 1991, at 5).

[42] See Attorney General's Memorandum at 28.

[43] See id.

reviewed and found to be without merit.[44]

Such administrative appeal responses, of course, necessarily must be stated in such a way that does not indicate whether an exclusion was in fact invoked.[45] Moreover, in order to preserve the effectiveness of the exclusion mechanism, requesters who inquire in any way whether an exclusion has been used should routinely be advised that it is the agency's standard policy to refuse to confirm or deny that an exclusion was employed in any particular case.[46]

Exclusion issues in court actions must be handled with similarly careful and thoughtful preparation. First, it need be recognized that any judicial review of a suspected exclusion determination must of course be conducted ex parte, based upon an in camera court filing submitted directly to the judge.[47] Second, it is essential to the integrity of the exclusion mechanism that requesters not be able to determine whether an exclusion was employed at all in a given case based upon how any case is handled in court. Thus, it is critical that the in camera defenses of exclusion issues raised in FOIA cases occur not merely in those cases in which an exclusion actually was employed and is in fact being defended.[48]

Accordingly, the Attorney General has stated that it is the government's standard litigation policy in the defense of FOIA lawsuits that, whenever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government will routinely submit an in camera declaration addressing that claim, one way or the other.[49] Where an exclusion was in fact employed, the correctness of that action will be justified to the court. Where an exclusion was not in fact employed, the in camera declaration will state simply that it is being submitted to the court so as to mask whether or not an exclusion is being employed, thus preserving the integrity of the exclusion process overall.[50] In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion case. Such a public decision, like an administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was had and that, if an exclusion was in fact employed, it was, and remains, amply justified.[51]

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[44] See id. at 28-29.

[45] See id. at 29.

[46] See id. at 29 & n.52.

[47] See id. at 29.

[48] See id.

[49] See id. at 30.

[50] See id.

[51] See id.; see Beauman v. FBI, No. Cv-92-7603, slip op. at 2 (C.D. Cal. (continued...)

DISCRETIONARY DISCLOSURE AND WAIVER

The Freedom of Information Act is an information disclosure statute which, through its exemption structure, strikes an overall balance between information disclosure and nondisclosure,[1] with an emphasis on the "fullest responsible disclosure."[2] Inasmuch as the FOIA's exemptions are discretionary, not mandatory,[3] agencies are free to make "discretionary disclosures" of exempt information, as a matter of good public policy and government accountability, wherever they are not otherwise prohibited from doing so.[4] Where they do so, agencies should not be held to have "waived" their ability to invoke applicable FOIA exemptions for similar or related information in the future. In other situations, however, various types of agency conduct and circumstances can reasonably be held to result in exemption waiver.

Discretionary Disclosure

Because the Freedom of Information Act does not itself prohibit the disclosure of any information,[5] an agency's ability to make a discretionary disclosure of information covered by a FOIA exemption necessarily hinges on whether any separate legal barrier to disclosure applies to the information in question. Some of the FOIA's exemptions--such as Exemption 2[6] and Exemp-

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[51](...continued)
Apr. 12, 1993) ("'In response to the plaintiff's claim of the (c)(1) exclusion being utilized in this action, . . . [w]ithout confirming or denying that any such exclusion was actually invoked by the defendant, the Court finds and concludes [after review of an in camera declaration] that if an exclusion was in fact employed, it was, and remains, amply justified.'" (adopting agency's proposed conclusion of law)).

[1] See John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).

[2] S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 30 (Dec. 1987); FOIA Update, Summer 1988, at 14.

[3] See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).

[4] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (An agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions."), cert. denied, 485 U.S. 977 (1988); see also FOIA Update, Summer 1985, at 3 ("It is well known that agencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions.").

[5] See 5 U.S.C. § 552(d) (1988).

[6] 5 U.S.C. § 552(b)(2).

tion 5,[7] for example--protect a type of information that is not subject to any such disclosure prohibition. Other FOIA exemptions--most notably Exemption 3[8]--directly correspond to, and serve to accommodate, distinct prohibitions on information disclosure that operate entirely independently of the FOIA. An agency is constrained from making a discretionary FOIA disclosure of the types of information covered by the following FOIA exemptions:

Exemption 1 of the FOIA protects from disclosure national security information concerning the national defense or foreign policy, provided that it has been properly classified in accordance with both the substantive and procedural requirements of an executive order.[9] As a general rule, an agency official holding classification authority determines whether any particular information requires classification and then that determination is implemented under the FOIA through the invocation of Exemption 1.[10] Thus, if information is in fact properly classified, and therefore is exempt from disclosure under Exemption 1, it is not appropriate for discretionary FOIA disclosure. (See discussion of Exemption 1, above.)

Exemption 3 of the FOIA explicitly accommodates the nondisclosure provisions that are contained in a variety of other federal statutes. Some of these statutory nondisclosure provisions, such as those pertaining to grand jury information[11] and census data,[12] categorically prevent disclosure harm and establish absolute prohibitions on agency disclosure; others leave agencies with some discretion as to whether to disclose certain information, but such administrative discretion generally is exercised independently of the FOIA.[13] (See discussion of Exemption 3, above.) Therefore, agencies ordinarily do not make discretionary disclosure under the FOIA of information that falls within the scope of Exemption 3.[14]

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[7] 5 U.S.C. § 552(b)(5).

[8] 5 U.S.C. § 552(b)(3).

[9] See 5 U.S.C. § 552(b)(1) (implementing current Executive Order 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988)).

[10] See generally FOIA Update, Winter 1985, at 1-2.

[11] See Fed. R. Crim. P. 6(e) (enacted as statute in 1977)

[12] See 13 U.S.C. §§ 8(b), 9(a) (1988).

[13] See, e.g., Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992).

[14] See, e.g., Association of Retired R.R. Workers v. Railroad Retirement Bd., 830 F.2d 331, 335 (D.C. Cir. 1987) (FOIA jurisdiction does not extend to exercise of agency disclosure discretion within Exemption 3 statute). But see Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (exceptional FOIA case in which court ordered Veterans Administration to disclose existence of certain medical records pursuant to discretionary terms of 38 U.S.C. § 7332(b)).

DISCRETIONARY DISCLOSURE AND WAIVER

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[15] For the most part, Exemption 4 protects information implicating private commercial interests that would not ordinarily be the subject of discretionary FOIA disclosure. (See discussions of Exemption 4, above, and "Reverse" FOIA, below.) Even more significantly, a specific criminal statute, the Trade Secrets Act,[16] prohibits the unauthorized disclosure of most (if not all) of the information falling within Exemption 4; its practical effect is to constrain an agency's ability to make a discretionary disclosure of Exemption 4 information,[17] absent an agency regulation (based upon a federal statute) that expressly authorizes disclosure.[18]

Exemptions 6 and 7(C) of the FOIA protect personal privacy interests, in non-law enforcement records[19] and law enforcement records,[20] respectively. As with private commercial information covered by Exemption 4, the personal information protected by Exemptions 6 and 7(C) is not the type of information ordinarily considered appropriate for discretionary FOIA disclosure; with these exemptions, a balancing of public interest considerations is built into the determination of whether the information is exempt in the first place. (See discussions of Exemption 6 and Exemption 7(C), above.) Moreover, the personal information covered by Exemptions 6 and 7(C) in many cases falls within the protective coverage of the Privacy Act of 1974,[21] which mandates that any such information concerning U.S. citizens and permanent-resident aliens that is maintained in a "system of records"[22] not be disclosed unless that disclosure is permitted under one of the specific exceptions to the Privacy Act's general disclosure prohibition.[23] Inasmuch as the FOIA-disclosure exception in the Privacy Act permits only those disclosures that are "required" under the FOIA,[24] the making of discretionary FOIA disclosures of personal information is fundamentally incompatible with the Privacy Act and, in many instances, is pro-

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[15] 5 U.S.C. § 552(b)(4).

[16] 18 U.S.C. § 1905 (1988).

[17] See CNA Fin. Corp. v. Donovan, 830 F.2d at 1144; see also FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

[18] See Chrysler v. Brown, 441 U.S. at 295-96; see, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979). (See discussion of this point under "Reverse" FOIA, below.)

[19] 5 U.S.C. § 552(b)(6).

[20] 5 U.S.C. § 552(b)(7)(C).

[21] 5 U.S.C. § 552a (1988 & Supp. IV 1992).

[22] 5 U.S.C. § 552a(a)(5).

[23] 5 U.S.C. § 552a(b).

[24] 5 U.S.C. § 552a(b)(2).

hibited by it.[25]

With the exception of information that is subject to the disclosure prohibitions accommodated by the above FOIA exemptions, agencies may make discretionary disclosures of any exempt information under the FOIA and agency FOIA officers should be encouraged to do so. Such disclosures are most appropriate where the interest protected by the exemption in question is primarily an institutional interest of the agency (rather than a private interest of an individual or commercial entity), one that the agency might choose to forego in a particular case--or in particular types of cases--as a matter of sound administrative discretion and overall public interest.[26]

One example is the type of administrative information that can fall within the "low 2" aspect of Exemption 2, which uniquely shields agencies from sheer administrative burden rather than from any reasonably foreseeable disclosure harm. (See discussion of Exemption 2, above.) In many instances, especially where the information in question is a portion of a document page not otherwise exempt in its entirety, such information would more efficiently be released than withheld.[27] As a practical matter, information should not be withheld unless it need be.

More common examples of the types of information appropriate for discretionary FOIA disclosure can be found under Exemption 5, which incorporates discovery privileges that nearly always protect only the institutional interests of the agency possessing the information. (See discussion of Exemption 5, above.) Information that might otherwise be withheld under the deliberative process privilege for the purpose of protecting the deliberative process in general can be disclosed where to do so would cause no foreseeable harm to any particular process of agency deliberation.[28] Similarly, many litigation-related

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[25] See DOD v. FLRA, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act's limitations on discretionary FOIA disclosure); see also FOIA Update, Summer 1984, at 2 (discussing interplay between FOIA and Privacy Act).

[26] See, e.g., Gregory v. FDIC, 631 F.2d 896, 899 & n.4 (D.C. Cir. 1980) (discretionary disclosure of information falling within Exemption 8); Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 203-05 (5th Cir. 1977) (discretionary disclosure of information falling within Exemption 9); Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 707 n.11, 712 n.34 (D.C. Cir. 1977) (discretionary disclosure of "deliberative process" information falling within Exemption 5).

[27] See FOIA Update, Winter 1984, at 11-12 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising agencies to invoke exemption only where doing so truly avoids burden).

[28] See, e.g., Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d at 707 n.11, 712 n.34; accord Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1072 (D.C. Cir. 1993) (suggesting harm standard

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records that otherwise might routinely be withheld under the attorney work-product privilege long after the conclusion of litigation can be considered for disclosure on the same basis.[29] Any such information, though technically or arguably falling within a FOIA exemption, need not be withheld if its disclosure would not foreseeably harm any governmental or other interest intended to be protected by that exemption.[30]

In this regard, it should be remembered that the FOIA requires agencies to disclose all "reasonably segregable" nonexempt portions of requested records.[31] The satisfaction of this important statutory requirement can involve an onerous delineation process, one that readily lends itself to the making of discretionary disclosures, particularly at the margins of FOIA exemption applicability.[32]

Furthermore, as a general rule, making a discretionary disclosure under the FOIA can significantly lessen an agency's burden at all levels of the administrative process, and it also eliminates the possibility that the information in question will become the subject of protracted litigation--thus serving an additional public interest in the conservation of increasingly scarce agency resources.

Where an agency considers making a discretionary disclosure of exempt information under the FOIA, it should be able to do so free of any concern that in exercising its administrative discretion with respect to particular information it is impairing its ability to invoke applicable FOIA exemptions for any arguably similar information. In the leading judicial precedent on this point, Mobil

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[28](...continued)
for factual information under deliberative process privilege); Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1436 n.8 (D.C. Cir. 1992) (same for relatively "mundane," nonpolicy-oriented information).

[29] See, e.g., FOIA Update, Summer 1985, at 5 (encouraging consideration of discretionary disclosure of attorney work-product information where possible to do so without causing harm to litigation process).

[30] Accord, e.g., Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d at 712 n.34 (observing that agencies should be willing to "disclos[e] information which while arguably exempt need not be withheld").

[31] 5 U.S.C. § 552(b) (final sentence); see also, e.g., PHE, Inc. v. Department of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (both agency and court must determine whether any withheld information can be segregated from exempt information and released).

[32] See, e.g., Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (emphasizing significance of segregation requirement in connection with deliberative process privilege under Exemption 5); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 983 (1st Cir. 1985) ("detailed process of segregation" held not unreasonable for request involving 36 document pages).

Oil Corp. v. EPA,[33] a FOIA requester argued that by making a discretionary release of certain records that could have been withheld under Exemption 5, the agency had waived its right to invoke that exemption for a group of "related" records.[34] In rejecting such a waiver argument, the Court of Appeals for the Ninth Circuit surveyed the law of waiver under the FOIA and found "no case . . . in which the release of certain documents waived the exemption as to other documents. On the contrary, [courts] generally have found that the release of certain documents waives FOIA exemptions only for those documents released."[35]

Such a general rule of nonwaiver through discretionary disclosure is supported by sound policy considerations, as the Ninth Circuit in Mobil Oil discussed at some length:

> Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents [of a related nature] to risk of disclosure. An agency would have an incentive to refuse to release all exempt documents if it wished to retain an exemption for any documents. . . . [R]eadily finding waiver of confidentiality for exempt documents would tend to thwart the [FOIA's] underlying statutory purpose, which is to implement a policy of broad disclosure of government records.[36]

This rule was presaged by the Court of Appeals for the D.C. Circuit many

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[33] 879 F.2d 698 (9th Cir. 1989).

[34] Id. at 700.

[35] Id. at 701; see Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case."); Stein v. Department of Justice, 662 F.2d 1245, 1259 (7th Cir. 1981) (exercise of discretion should waive no right to withhold records of "similar nature"); Schiller v. NLRB, No. 87-1176, slip op. at 7 (D.D.C. July 10, 1990) ("Discretionary release of a document pertains to that document alone, regardless of whether similar documents exist."), rev'd on other grounds, 964 F.2d 1205 (D.C. Cir. 1992); see also, e.g., United States Student Ass'n v. CIA, 620 F. Supp. 565, 571 (D.D.C. 1985) (no waiver through prior disclosure except as to "duplicate" information); Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (same); cf. Silber v. United States Dep't of Justice, No. 91-876, transcript at 18 (D.D.C. Aug. 13, 1992) (bench order) (no waiver would be found even if it were to be established that other comparable documents had been disclosed).

[36] 879 F.2d at 701; see also Army Times Publishing Co. v. Department of the Air Force, 998 F.2d at 1068 (articulating general principle of no waiver of exemption simply because agency released "information similar to that requested" in past).

years ago, when it observed:

> Surely this is an important consideration. The FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act's spirit of open government and liberal disclosure of information.[37]

As another court more recently phrased it: "A contrary rule would create an incentive against voluntary disclosure of information."[38] Agencies should be mindful, though, that this nonwaiver rule applies to true discretionary disclosures made under the FOIA--which should be made available to anyone--as distinguished from any "selective" disclosure made more narrowly outside the context of the FOIA.[39] Such non-FOIA disclosures can lead to more difficult waiver questions.

Waiver

Sometimes, when a FOIA exemption is being invoked, a further inquiry must be undertaken: a determination of whether, through some prior disclosure or an express authorization, the applicability of the exemption has been waived. Resolution of this inquiry requires a careful analysis of the specific nature of and circumstances surrounding the prior disclosure involved.[40] First and foremost, if the prior disclosure does not "match" the exempt information in question, the difference between the two might itself be a significant basis for reach-

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[37] Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d at 712 n.34.

[38] Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992); see also Public Law Educ. Inst. v. United States Dep't of Justice, 744 F.2d 181, 183-84 (D.C. Cir. 1984) (no FOIA attorneys fees liability where agency disclosed requested record as matter of administrative discretion); Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (agency should not be penalized for declassifying and releasing documents during litigation; otherwise, there would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld").

[39] See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (finding waiver where agency made "selective" disclosure to one interested party only); Committee to Bridge the Gap v. Department of Energy, No. 90-3568, transcript at 5 (C.D. Cal. Oct. 11, 1991) (bench order) (waiver found where agency gave preferential treatment to interested party; such action is "offensive" to FOIA and "fosters precisely the distrust of government the FOIA was intended to obviate").

[40] See FOIA Update, Spring 1983, at 6; see also Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes a waiver is fact specific."); Carson v. United States Dep't of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed.").

ing the conclusion that no waiver has occurred.[41]

Although courts are generally sympathetic to the necessities of effective agency functioning when confronted with an issue of waiver,[42] courts do look harshly upon prior disclosures that result in unfairness.[43] In one case, Hop-

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[41] See, e.g., Afshar v. Department of State, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (finding that "withheld information is in some material respect different" from that to which requester claimed had been released previously); Public Citizen v. Department of State, 787 F. Supp. 12, 13 (D.D.C. 1992) (appeal pending); see also, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (no waiver where withheld information "pertain[s] to a time period later than the date of the publicly documented information"); Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 9 (D.D.C. June 28, 1993) (no waiver where requester failed to show that information available to public duplicates that being withheld); Hunt v. FBI, No. C-92-1390, slip op. at 15-16 (N.D. Cal. Sept. 16, 1992) (agency not required to disclose documents where "similar" ones were previously released; none of released documents were "as specific as" or "match" requested documents); Silber v. United States Dep't of Justice, transcript at 18 (release of other manuals in other subject-matter areas does not compel release of fraud monograph). But see also Committee to Bridge the Gap v. Department of Energy, transcript at 2-5 (distinguishing Mobil Oil and finding deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party; agency ordered to release earlier draft order and all subsequent revisions).

[42] See, e.g., Massey v. FBI, No. 92-6086, slip op. 5667, 5676 (2d Cir. Aug. 27, 1993) (individuals held not to waive "strong privacy interests in government documents containing information about them even where the information may have been public at one time"); Irons v. FBI, 880 F.2d 1446, 1452 (1st Cir. 1989) (en banc) (public testimony by confidential source does not waive FBI's right to withhold information pursuant to Exemption 7(D)); Cooper v. Department of the Navy, 558 F.2d 274, 278 (5th Cir. 1977) (prior disclosure of aircraft accident investigation report to aircraft manufacturer held not to constitute waiver); Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 5-6 (D.D.C. July 6, 1988) (disclosure to foreign government does not constitute waiver); Medera Community Hosp. v. United States, No. 86-542, slip op. at 6-9 (E.D. Cal. June 28, 1988) (no waiver where memoranda interpreting agency's regulations sent to state auditor involved in enforcement proceeding); Erb v. United States Dep't of Justice, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (nondisclosure under Exemption 7(A) upheld after "limited disclosure" of FBI criminal investigative report to defense attorney and state prosecutor).

[43] See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) ("selective disclosure" of record to one party in litigation deemed "offensive" to FOIA and held to prevent agency's subsequent invocation of Exemption 5 against other party to litigation); Committee to Bridge the Gap v. Department of Energy, transcript at 3-5 (deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested

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kins v. Department of the Navy,[44] a commercial life insurance company sought access to records reflecting the name, rank, and duty location of servicemen stationed at Quantico Marine Corps Base. The district court, although not technically applying the doctrine of waiver, rejected the agency's privacy arguments on the grounds that officers' reassignment stations were routinely published in the Navy Times and that the Department of Defense had disclosed the names and addresses of 1.4 million service members to a political campaign committee.[45]

An agency's failure to heed even its own regulations regarding circulation of internal agency documents was found determinative and led to a finding of waiver in Shermco Industries v. Secretary of the Air Force.[46] Similarly, an agency's personnel regulation requiring disclosure of (or a promise by an agency official to disclose) the information,[47] an agency's carelessness in permitting access to certain information,[48] and an entirely mistaken disclosure of the contents of a document[49] have all resulted in waiver.[50]

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[43](...continued)
party; selective disclosure is "offensive" to FOIA); Northwest Envtl. Defense Ctr. v. United States Forest Serv., No. 91-125, slip op. at 12 (D. Or. Aug. 23, 1991) (magistrate's recommendation) (deliberative process privilege waived as to portion of agency report discussed with "interested" third party), adopted (D. Or. Feb. 12, 1992).

[44] No. 84-1868, slip op. at 5-6 (D.D.C. Feb. 5, 1985).

[45] See id. at 6; see also In re Subpoena Duces Tecum, 738 F.2d 1367, 1371-74 (D.C. Cir. 1984) (voluntary disclosure by private party of information to one agency waived attorney work-product and attorney-client privileges when same information sought by second agency) (non-FOIA case).

[46] 613 F.2d 1314, 1320 (5th Cir. 1980).

[47] See Johnson v. HHS, No. 88-243-5, slip op. at 10-11 (E.D.N.C. Feb. 7, 1989).

[48] See, e.g., Cooper v. Department of the Navy, 594 F.2d 484, 488 (5th Cir. 1978), cert. denied, 444 U.S. 926 (1979); cf. Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (no waiver where information disclosed under "strict confidentiality") (appeal pending).

[49] See, e.g., Dresser Indus. Valve Operations, Inc. v. EEOC, 2 Gov't Disclosure Serv. (P-H) ¶ 82,197, at 82,575 (W.D. La. Jan. 19, 1982). But see also Nation Magazine v. Department of State, 805 F. Supp. 68, 73 (D.D.C. 1992) ("[N]o rule of administrative law requires an agency to extend erroneous treatment of one party to other parties, 'thereby turning an isolated error into a uniform misapplication of the law.'" (quoting Sacred Heart Medical Ctr. v. Sullivan, 958 F.2d 537, 548 n.24 (3d Cir. 1992) (dicta))); Astley v. Lawson, No. 89-2806, slip op. at 20 (D.D.C. Jan. 11, 1991) (inadvertent placement of documents into public record held not to waive exemption where it was remedied immediately upon agency's awareness of mistake); cf. Myers v. Williams,
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On the other hand, the Court of Appeals for the First Circuit has firmly held that the mere fact that a confidential source testifies at a trial does not waive Exemption 7(D) protection for any source-provided information not actually revealed in public.[51] Nor does public congressional testimony waive Exemption 1 protection where the context of the information publicized is different and only some of the information is revealed.[52]

In one case it was held that the oral disclosure of only the conclusion reached in a predecisional document "does not, without more, waive the [delib-

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[49](...continued)
No. 92-1609 (D. Or. Apr. 21, 1993) (preliminary injunction granted prohibiting FOIA requester from disclosing original and all copies of erroneously disclosed document containing trade secrets) (non-FOIA case).

[50] See also Gannett River States Publishing Corp. v. Bureau of the Nat'l Guard, No. J91-0455-L, slip op. at 14 (S.D. Miss. Mar. 2, 1992) (privacy interests in withholding identities of soldiers disciplined for causing accident is de minimis because agency previously released much identifying information); Powell v. United States, 584 F. Supp. 1508, 1520-21 (N.D. Cal. 1984) (suggesting that attorney work-product privilege may be waived where agency made earlier release of such information which "reflect[ed] positively" on agency, and later may have withheld work-product information on same matter which did not reflect so "positively" on agency).

[51] See Irons v. FBI, 880 F.2d at 1454; see also LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 14 (D.D.C. June 24, 1993) (agency must review requested file and disclose those portions which were revealed at trial); Church of Scientology Int'l v. FBI, No. 91-10850-Y, slip op. at 4-5 (D. Mass. Nov. 23, 1992) (privacy protection waived for information about individuals who publicly testified at trial and who have been identified). But see Jones v. FBI, No. C77-1001, slip op. at 13-14 (N.D. Ohio Aug. 12, 1992) (identities of confidential informants and third parties are not waived even if they have testified in court and are publicly known) (appeal pending); but see also Williams v. FBI, 822 F. Supp. 808, 814 n.3 (D.D.C. 1993) (public testimony by confidential sources does not waive exemption); cf. Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 25-26 (D. Mass. Nov. 12, 1992) (neither testimony at trial nor actual trial itself waives protection for documents prepared in anticipation of litigation); Wechsler v. United States Consumer Prod. Safety Comm'n, No. 92-402, slip op. at 4 (S.D. Fla. Oct. 19, 1992) (magistrate's recommendation) (fact that confidential source and/or confidential information may subsequently be disclosed does not affect exemption), adopted sub nom. United States v. United States Consumer Prod. Safety Comm'n (S.D. Fla. Dec. 1, 1992).

[52] See Fitzgibbon v. CIA, 911 F.2d at 765 (prior disclosure does not waive "information pertaining to a time period later than the date of the publicly documented information"); see also Afshar v. Department of State, 702 F.2d at 1131-32 (finding no waiver where withheld information is in some respect materially different); Public Citizen v. Department of State, 787 F. Supp. at 15.

erative process] privilege."[53] In another, an agency disclosure to a small group of nongovernmental personnel, with no copies permitted, was held not to inhibit agency decisionmaking so that the deliberative process privilege was not waived.[54]

As is suggested above, if the agency is able to establish that it acted responsibly and in furtherance of a legitimate governmental purpose, its later claim of exemption will likely prevail.[55] Of course, circulation of a document within the agency does not waive an exemption,[56] nor does disclosure among agencies,[57] or to advisory committees (even those including members of the

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[53] Morrison v. United States Dep't of Justice, No. 87-3394, slip op. at 3 (D.D.C. Apr. 29, 1988). But see Myles-Pirzada v. Department of the Army, No. 91-1080, slip op. at 6 (D.D.C. Nov. 20, 1992) (privilege waived when agency official read report to requester over telephone); Washington Post Co. v. United States Dep't of the Air Force, 617 F. Supp. 602, 605 (D.D.C. 1985) (disclosure of document's conclusions waived privilege for body of document).

[54] See Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. 572, 577-78 (D.D.C. 1984); see also Brinderson Constructors, Inc. v. Army Corps of Eng'rs, No. 85-0905, slip op. at 12 (D.D.C. June 11, 1986) (requester's participation in agency enterprise did not entitle requester to all related documents). But see Myles-Pirzada v. Department of the Army, slip op. at 6 (privilege waived when agency official read report to requester over telephone); Shell Oil Co. v. IRS, 772 F. Supp. 202, 211 (D. Del. 1991) (finding waiver when agency employee read aloud entire draft document at public meeting: "Where an authorized disclosure is voluntarily made to a non-federal party, the government waives any claim that the information is exempt from disclosure under the deliberative process privilege.").

[55] See FOIA Update, Spring 1983, at 6; see, e.g., Badhwar v. United States Dep't of the Air Force, 629 F. Supp. 478, 481 (D.D.C. 1986) (disclosure to outside person held necessary to assemble report in first place), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); FOIA Update, Winter 1984, at 4.

[56] See, e.g., Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, slip op. at 12-14 (N.D. Ill. Oct. 5, 1992) (no waiver of attorney-client privilege where documents in question were circulated to only those employees who needed to review legal advice contained in it); Lasker-Goldman Corp. v. GSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,125, at 81,322 (D.D.C. Feb. 27, 1981) (no waiver where document was circulated to management officials within agency).

[57] See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (agency does not automatically waive exemption by releasing documents to other agencies); Silber v. United States Dep't of Justice, transcript at 10-18 (distribution of manual to other agencies does not constitute waiver). But cf. Lacefield v. United States, No. 92-N-1680, slip op. at 11 (D. Colo. Mar. 10, 1993) (attorney-client privilege waived with respect to letter from City of Denver attorney to Colorado Department of Safety because letter was circulated to IRS).

public).[58] Similarly, deference to the common agency practice of disclosing specifically requested information to a congressional committee,[59] or to the General Accounting Office (an arm of Congress),[60] or to state attorneys general,[61] does not waive FOIA exemption protection for that information.

Indeed, when an agency has been compelled to disclose a document under limited and controlled conditions, such as under a protective order in an administrative proceeding, its authority to withhold the document thereafter is not diminished.[62] This applies as well to other disclosures in the criminal discovery context.[63]

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[58] See, e.g., Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-08 (D.C. Cir. 1976).

[59] See, e.g., Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (holding no waiver of exemption due to court-ordered disclosure, involuntary disclosure to Congress, or disclosure of related information); Aspin v. DOD, 491 F.2d 24, 26 (D.C. Cir. 1973); see also Eagle-Picher Indus. v. United States, 11 Ct. Cl. 452, 460-61 (1987) (work-product privilege not waived in nonspecific congressional testimony "if potentially thousands of documents need be reviewed to determine if the gist or a significant part of documents were revealed") (non-FOIA case); FOIA Update, Winter 1984, at 3-4 ("OIP Guidance: Congressional Access Under FOIA") (analyzing and cabining Murphy v. Department of the Army, 613 F.2d 1151 (D.C. Cir. 1979)).

[60] See, e.g., Shermco Indus. v. Secretary of the Air Force, 613 F.2d at 1320-21.

[61] Interco, Inc. v. FTC, 490 F. Supp. 39, 44 (D.D.C. 1979).

[62] See, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 n.13 (2d Cir. 1979); see also Silverberg v. HHS, No. 89-2743, slip op. at 7 (D.D.C. June 14, 1991) (fact that individual who is subject of drug test by particular laboratory has right of access to its performance and testing information does not render such information publicly available), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993).

[63] See, e.g., Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (fact that local police department released records pursuant to New York Freedom of Information Law and one of its officers testified at length in court held not to waive police department's status as confidential source under Exemption 7(D)); Parker v. Department of Justice, 934 F.2d 375, 379 (D.C. Cir. 1991) (nondisclosure under Exemption 7(D) upheld even though confidential informant may have testified at requester's trial); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 12 (D.D.C. 1991) (even if some of withheld information has appeared in print, nondisclosure is proper because disclosure from official source would confirm unofficial information and thereby cause harm to third parties); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 2-3 (D.D.C. June 24, 1991) (nondisclosure under Exemptions 7(A), 7(C), 7(D) and 7(F) upheld even though agency disclosed information in criminal proceeding), sum-

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DISCRETIONARY DISCLOSURE AND WAIVER

The one circumstance in which an agency's failure to treat information in a responsible, appropriate fashion should not result in waiver is where the failure is not fairly attributable to the agency--i.e., where an agency employee has made an unauthorized disclosure, a "leak" of information. Recognizing that a finding of waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks,"[64] the courts have consistently refused to penalize agencies by holding that because of such conduct a waiver has occurred.[65]

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[63](...continued)
mary affirmance granted in pertinent part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); Glick v. Department of Justice, No. 89-3279, slip op. at 8 (D.D.C. June 20, 1991) (fact that agency discloses information in one context does not waive confidentiality of information or of those who provide it); Crooker v. Bureau of Alcohol, Tobacco & Firearms, No. 85-615, slip op. at 4-5 (D.D.C. Aug. 2, 1985) (nondisclosure under Exemption 7(A) upheld even though requester reviewed document in prior parole hearing), rev'd on other grounds, 789 F.2d 64 (D.C. Cir. 1986); Erb v. United States Dep't of Justice, 572 F. Supp. at 956 (nondisclosure to third party upheld under Exemption 7(A) even though document provided to defendant through criminal discovery); Krohn v. Department of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,120, at 83,724 (D.D.C. Sept. 7, 1979) (nondisclosure under Exemption 7(D) upheld even though requester previously reviewed documents as defendant in criminal discovery); see also Murphy v. FBI, 490 F. Supp. 1138, 1141 & n.6 (D.D.C. 1980) (citing Krohn with approval), summary judgment vacated as moot, No. 80-1612 (D.C. Cir. Jan. 8, 1981).

[64] Murphy v. FBI, 490 F. Supp. at 1142.

[65] See, e.g., Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver); Medina-Hincapie v. Department of State, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (official's ultra vires release does not constitute waiver); LaRouche v. United States Dep't of Justice, slip op. at 14 (fact that some aspects of grand jury proceeding were leaked to press has "no bearing" on FOIA litigation); Resolution Trust Corp. v. Dean, 813 F. Supp. 1426, 1429-30 (D. Ariz. 1993) (no waiver of attorney-client privilege where agency took precautions to secure confidentiality of document but inexplicable leak nonetheless occurred) (non-FOIA case); Silber v. United States Dep't of Justice, transcript at 18 (unauthorized publication of parts of document does not constitute waiver); Washington Post Co. v. DOD, No. 84-2949, slip op. at 16-18 (D.D.C. Feb. 25, 1987) (congressional leaks); Lone Star Indus. v. FTC, No. 82-3150, slip op. at 17 n.8 (D.D.C. June 8, 1983); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 58 n.3 (D.D.C. 1983), aff'd, 772 F.2d 919 (D.C. Cir. 1984); Lasker-Goldman Corp. v. GSA, 2 Gov't Disclosure Serv. (P-H) at 81,322; Safeway Stores, Inc. v. FTC, 428 F. Supp. 346, 347 (D.D.C. 1977); see also In re Engram, No. 91-1722, slip op. at 3, 6-7 (4th Cir. June 2, 1992) (per curiam) (permitting discovery as to circumstances of suspected leak); cf. Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (agency not required to confirm or deny accuracy of information released by other government agencies regarding its interest in certain individuals); Rush v. Department of State, 748 F.
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On the other hand, "official" disclosures--i.e., direct acknowledgments by authoritative government officials--may well waive an otherwise applicable FOIA exemption.[66] In this context, one decision held that information that was the subject of an "off-the-record" disclosure to the press cannot be protected under Exemption 1.[67] Similarly, an individual's express disclosure authorization with respect to his own interests implicated in requested records can also result in a waiver.[68]

Finally, it should be noted that an agency should not be required to demonstrate in a FOIA case that it has positively determined that not a single disclosure of any withheld information has occurred.[69] Indeed, the burden is on

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[65](...continued)
Supp. 1548, 1556 (S.D. Fla. 1990) (finding that author of agency documents, who had since left government service, did not have authority to waive Exemption 5 protection).

[66] See Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985); see, e.g., Myles-Pirzada v. Department of the Army, slip op. at 6 (privilege waived when agency official read report to requester over telephone); Schlesinger v. CIA, 591 F. Supp. 60, 61 (D.D.C. 1984); see also Krikorian v. Department of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (court on remand must determine whether redacted portions of document had been "officially acknowledged"); Afshar v. Department of State, 702 F.2d at 1133 (books by former agency officials do not constitute "an official and documented disclosure"); Hunt v. FBI, slip op. at 16-18 (alleged nongovernmental disclosure of contents of requested documents does not constitute "official" acknowledgement); Holland v. CIA, No. 91-1233, slip op. at 13-14 (D.D.C. Aug. 31, 1992) (applying Afshar and finding that requester has not demonstrated that specific information in public domain has been "officially acknowledged"); United States Student Ass'n v. CIA, 620 F. Supp. at 571.

[67] Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989), motion for reargument denied, No. 87-Civ-1115, slip op. at 1-3 (S.D.N.Y. May 23, 1990).

[68] See, e.g., Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 567 (1st Cir. 1992) (source statements not entitled to Exemption 7(D) protection where individuals expressly waived confidentiality); Key Bank of Me., Inc. v. SBA, No. 91-362, slip op. at 16 (D. Me. Dec. 31, 1992) (given that subject of documents has specifically waived any privacy interest she might have in requested information, agency has not demonstrated that release of information would harm any privacy interest) (Exemption 6). But see Church of Scientology Int'l v. IRS, 995 F.2d 916, 921 (9th Cir. 1993) (IRS agents' purported waivers of privacy interests held insufficient to compel disclosure).

[69] See Williams v. United States Dep't of Justice, 556 F. Supp. 63, 66 (D.D.C. 1982) (court refused, in FOIA action brought by former Senator convicted in Abscam investigation, to impose upon agency duty to search for possibility that privacy interests "may have been partially breached in the course of
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the plaintiff to show that the information sought is public.[70] As the Court of Appeals for the District of Columbia Circuit pointedly observed: "It is far more efficient, and obviously fairer, to place the burden of production on the party who claims that the information is publicly available."[71]

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[69](...continued)
many-faceted proceedings occurring in different courts over a period of prior years," for to do so "would defeat the exemption in its entirety or at least lead to extended delay and uncertainty"); cf. McGehee v. Casey, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983) (in non-FOIA case involving CIA's prepublication review, agency "cannot reasonably bear the burden of conducting an exhaustive search to prove that a given piece of information is not published anywhere" else).

[70] See, e.g., Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279-82 (D.C. Cir. 1992) ("party who asserts . . . material publicly available carries the burden of production on that issue . . . because the task of proving the negative--that the information has not been revealed--might require the government to undertake an exhaustive, potentially limitless search"; where neither requester nor agency knows exactly which portions of wiretap tapes were played in open court, requester has burden of proving actual disclosure to establish waiver); Freeman v. United States Dep't of Justice, slip op. at 6-9 (finding that requester failed to demonstrate that agencies have shown "complete disregard for confidentiality" and had not shown that information available to public duplicated that being withheld); Public Citizen v. Department of State, 782 F. Supp. 144, 145-46 (D.D.C. 1992) ("fact [plaintiff has shown] that some of the information [contained in documents] was revealed does not negate the confidentiality of the documents as they exist"), reconsideration & summary judgment granted, 787 F. Supp. 12 (D.D.C. 1992) (appeal pending); Pfeiffer v. CIA, 721 F. Supp. 337, 342 (D.D.C. 1989) (plaintiff must do more than simply identify "information that happens to find its way into a published account" to meet this burden); Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba, 624 F. Supp. at 578 ("Unless plaintiff can demonstrate that specific information in the public domain appears to duplicate that being withheld, it has failed to bear its burden of showing prior disclosure."); United States Student Ass'n v. CIA, 620 F. Supp. at 571 (plaintiff's generalized assertion rejected as unsupported by factual submission); cf. Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) ("It is far more efficient, and . . . fairer, to place the burden of production on the party who claims that the information is publicly available.") (reverse FOIA case). But see Resolution Trust Corp. v. Dean, 813 F. Supp. at 1429 ("[A] party seeking to invoke the attorney-client privilege has the burden of affirmatively demonstrating nonwaiver.") (non-FOIA case); Washington Post v. DOD, 766 F. Supp. 1, 12-13 (D.D.C. 1991) (agency has ultimate burden of proof when comparing publicly disclosed information with information being withheld, determining whether information is identical and, if not, determining whether release of slightly different information would harm national security).

[71] Occidental Petroleum Corp. v. SEC, 873 F.2d at 342 (reverse FOIA case).

(The related issue of whether an agency waives its ability to invoke an exemption in litigation by not raising it at an early stage of the proceedings is discussed in the Waiver of Exemptions in Litigation subsection of Litigation Considerations, below.)

FEES AND FEE WAIVERS

Prior to the passage of the Freedom of Information Reform Act of 1986, the FOIA authorized agencies to assess reasonable charges only for document search and duplication, and any assessable fees were to be waived or reduced if disclosure of the requested information was found to be generally in the "public interest."[1] The FOIA Reform Act brought significant changes to the way in which fees are now assessed under the FOIA. A new fee structure was established, including a new provision authorizing agencies to assess "review" charges when processing records in response to a commercial-use request, and specific fee limitations and restrictions were set on the assessment of certain fees both in general as well as for certain categories of requesters.[2] Additionally, this FOIA amendment replaced the statutory fee waiver provision with a revised standard.[3]

These new fee and fee waiver provisions were made effective as of April 25, 1987, but required implementing agency regulations to be fully effective.[4] Under the FOIA Reform Act, the Office of Management and Budget was charged with the responsibility of promulgating, pursuant to notice and receipt of public comment, a "uniform schedule of fees" for individual agencies to follow when promulgating their FOIA fee regulations.[5] On March 27, 1987, the Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Fee Guidelines] were published in final form.[6]

The FOIA Reform Act required agencies to promulgate not only a fee schedule but also specific "procedures and guidelines for determining when such fees should be waived or reduced."[7] Thus, the Department of Justice, in accordance with its statutory responsibility to encourage agency compliance

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[1] 5 U.S.C. § 552(a)(4)(A) (1982), amended by Pub. L. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50.

[2] See Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49, 3207-50 (codified as amended at 5 U.S.C. § 552(a)(4)(A) (1988)).

[3] See id. § 1803, 100 Stat. at 3207-50.

[4] See id. § 1804(b), 100 Stat. at 3207-50.

[5] Id. § 1803, 100 Stat. at 3207-49; Media Access Project v. FCC, 883 F.2d 1063, 1069 (D.C. Cir. 1989) (OMB expressly mandated to establish fee schedule and guidelines for statutory fee categories).

[6] 52 Fed. Reg. 10,011 (1987).

[7] Pub. L. No. 99-570, § 1803, 100 Stat. at 3207-49.

with the FOIA,[8] developed new governmentwide policy guidance on the waiver of FOIA fees, to replace its previous guidance issued in January 1983 (supplemented in November 1986) implementing the predecessor statutory fee waiver standard.[9] On April 2, 1987, to assist federal agencies in addressing fee waivers in their new FOIA fee regulations, the former Assistant Attorney General for Legal Policy issued the New FOIA Fee Waiver Policy Guidance to the heads of all federal departments and agencies.[10]

Because Congress provided only a 180-day period for the preparation and implementation of new agency fee regulations, virtually all federal agencies were still engaged in this multiple-step process as of the April 25, 1987 effective date. Consequently, the Office of Management and Budget advised agencies to give FOIA requesters the full benefits of both the old and the new provisions, consistent with the clear contemplation of the new law,[11] for the interim period between April 25, 1987, and the time at which an agency's new implementing regulation became effective; the Department of Justice advised likewise regarding the making of fee waiver determinations.[12]

Fees

As amended by the Freedom of Information Reform Act of 1986, the FOIA sets forth three levels of fees which may be assessed in response to FOIA requests according to categories of FOIA requesters. These categorical provisions contain limitations on the assessment of fees, with the level of fees to be charged depending upon the identity of the requester and the intended use of the information sought.[13] The following discussion will summarize these fee provisions. The OMB Fee Guidelines, however, discuss these provisions in greater, authoritative detail and should be consulted by anyone with a FOIA fee (as opposed to fee waiver) question.[14]

The first level of fees includes charges for "document search, duplication

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[8] See 5 U.S.C. § 552(e) (1988).

[9] See FOIA Update, Winter/Spring 1987, at 1-2; FOIA Update, Summer 1986, at 3; FOIA Update, Jan. 1983, at 3-4.

[10] See FOIA Update, Winter/Spring 1987, at 3-10; Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 41-50 (Dec. 1987).

[11] See Pub. L. No. 99-570, § 1804(b)(2), 100 Stat. at 3207-50.

[12] See FOIA Update, Winter/Spring 1987, at 2. (For a sample fee regulation, see the Department of Justice's final regulation, published at 28 C.F.R. § 16.10 (1993).)

[13] See 5 U.S.C. § 552(a)(4)(A)(ii) (1988); see also FOIA Update, Winter/Spring 1987, at 4.

[14] See OMB Fee Guidelines, 52 Fed. Reg. 10,011 (1987).

and review, when records are requested for commercial use."[15] The OMB Fee Guidelines define the term "commercial use" as "a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is being made," which can include furthering those interests through litigation.[16] The "review" costs which may be charged on such requests consist of the "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA]."[17] Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release; but it does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions already applied.[18]

The second level of fees limits charges to document duplication costs only, "when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media."[19] Although FOIA requesters falling into one or more of these three subcategories of requesters under the amended Act enjoy a complete "exemption" from the assessment of search fees, their requests, like those made by any FOIA requester, still must "reasonably describe" the records sought in order to not impose upon an agency "'an unreasonably burdensome search.'"[20] (For a further discussion of this requirement, see Procedural Requirements, above.)

The OMB Fee Guidelines define "educational institution" to include various categories of schools, as well as institutions of higher learning and vocational education.[21] This definition is limited, however, by the requirement that the educational institution be one "which operates a program or programs of

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[15] 5 U.S.C. § 552(a)(4)(A)(ii)(I).

[16] OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18. But see McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987) (no "commercial interest" found in records sought in furtherance of requesters' tort claim); Muffoletto v. Sessions, 760 F. Supp. 268, 277-78 (E.D.N.Y. 1991) (no commercial use found where records were sought to defend against state court action to recover debts).

[17] 5 U.S.C. § 552(a)(4)(A)(iv).

[18] See OMB Fee Guidelines, 52 Fed. Reg. at 10,017-18.

[19] 5 U.S.C. § 552(a)(4)(A)(ii)(II).

[20] American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (quoting Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978)); see also Nance v. United States Postal Serv., No. 91-1183, slip op. at 5 n.3 (D.D.C. Jan. 24, 1992) (dictum) (in some instances, search burden might be too disruptive to agency).

[21] OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

scholarly research."[22] The definition of a "non-commercial scientific institution" refers to a "non-commercial" institution "operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."[23]

The definition of a "representative of the news media" refers to any person actively gathering information of current interest to the public for an organization that is organized and operated to publish or broadcast news to the general public.[24] The Court of Appeals for the District of Columbia Circuit has elaborated upon this definition, holding that "a representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."[25] Such a definition, the D.C. Circuit made clear, excludes "'private librar[ies]' or 'private repositories'" of government records, or middlemen such as "'information vendors [or] data brokers,'" who request records for use by others.[26] This fee category, however, may include freelance journalists, where they can demonstrate a solid basis for expecting the information disclosed to be published by a news organization.[27] The first case to construe this provision held that even a foreign news service may qualify as a representative of the news media.[28]

The third level of fees, which applies to all requesters who do not fall within either of the preceding two fee levels, consists of reasonable charges for document search and duplication, as was provided for in the former statutory FOIA fee provision.[29] Reasonable charges for search time include all the time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents.[30] Additionally, agencies may charge for search time even if they fail to locate any records responsive to the request or even if the records located are subsequently determined to be exempt

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[22] Id.; see also National Sec. Archive v. DOD, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989) (approving implementation of this standard in DOD regulation), cert. denied, 494 U.S. 1029 (1990).

[23] OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

[24] Id.

[25] National Sec. Archive v. DOD, 880 F.2d at 1387; cf. Carney v. United States Dep't of Justice, No. 92-Cv-6204, slip op. at 16-17 (W.D.N.Y. Apr. 27, 1993) (occasional journalistic activities do not qualify requester as representative of news media) (appeal pending).

[26] National Sec. Archive v. DOD, 880 F.2d at 1387.

[27] OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

[28] Southam News v. INS, 674 F. Supp. 881, 892 (D.D.C. 1987).

[29] See 5 U.S.C. § 552(a)(4)(A)(ii)(III).

[30] OMB Fee Guidelines, 52 Fed. Reg. at 10,017.

from disclosure.[31]

The fee structure now also includes restrictions both on the assessment of certain fees and on the authority of agencies to ask for an advance payment of a fee.[32] No FOIA fee may be charged by an agency if the government's cost of collecting and processing the fee is likely to equal or exceed the amount of the fee itself.[33] In addition, except with respect to requesters seeking records for a commercial use, agencies must provide the first 100 pages of duplication, as well as the first two hours of search time, without charge to the requester.[34] These two provisions work together so that, except with respect to commercial-use requesters, agencies should not begin to assess fees until after they provide this amount of free search and duplication; the assessable fee for any requester then must be greater than the agency's cost to collect and process it in order for the fee actually to be charged.[35]

Agencies also may not require a requester to make an advance payment, i.e., payment before work is begun or continued on a request, unless the agency first estimates that the assessable fee is likely to exceed $250.00, or unless the requester has previously failed to pay a properly assessed fee in a timely manner (i.e., within 30 days of the billing date).[36] This restriction does not prevent agencies from requiring payment before records which have been processed are released. Where an agency reasonably believes that a requester is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate those requests and

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[31] Id. at 10,019; see also Cheek v. IRS, No. 83 C 6851, slip op. at 2 (N.D. Ill. June 11, 1984).

[32] See 5 U.S.C. § 552(a)(4)(A)(iv)-(v).

[33] Id. § 552(a)(4)(A)(iv)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

[34] 5 U.S.C. § 552(a)(4)(A)(iv)(II); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018-19.

[35] 5 U.S.C. § 552(a)(4)(A)(iv)(I); see also OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

[36] 5 U.S.C. § 552(a)(4)(A)(v); see OMB Fee Guidelines, 52 Fed. Reg. at 10,020; see also Centracchio v. FBI, No. 92-357, slip op. at 5 (D.D.C. Mar. 16, 1993) (failure to pay requested advance deposit on fee in excess of $250 held fatal to requester's FOIA claim); Nance v. United States Postal Serv., slip op. at 3 (where fees exceed $250 and fee waiver is inappropriate, agency may refuse to begin search until requester makes advance payment); Schmanke v. United States Postal Serv., No. 89-1551, slip op. at 6 (D.D.C. Jan. 4, 1990) (advance payment appropriate where requester previously failed to pay fees in timely manner and fee is likely to exceed $250); Hall v. United States Dep't of Justice, No. 88-3071, slip op. at 2-3, 5 (D.D.C. Mar. 31, 1989) (where request for advance payment permissible and agency requests mere promise to pay instead, requester's failure to provide such promise warrants summary judgment for agency).

charge accordingly.[37] The OMB Fee Guidelines should be consulted for additional guidance on aggregating requests.[38]

The amended law also provides that FOIA fees are superseded by "fees chargeable under a statute specifically providing for setting the level of fees for particular types of records."[39] Thus, when documents responsive to a FOIA request are maintained for distribution by an agency according to a statutorily based fee schedule, requesters must obtain the documents from that source and pay the applicable fees in accordance with the fee schedule of that other statute.[40] The superseding of FOIA fees by the fee provisions of another statute raises a related question as to whether an agency with a statutorily based fee schedule is subject to the FOIA's fee waiver provision; although this question has been raised, it has not yet been reached by the courts.[41]

Because the FOIA Reform Act is silent with respect to the standard and scope of judicial review of FOIA fee issues,[42] the standard should remain the same as that under the predecessor statutory fee provision--i.e., agency action should be upheld unless it is found to be "arbitrary or capricious," in accordance with the Administrative Procedure Act.[43] Perhaps due to this lack of statutory clarity, the appropriate standard of review has yet to be clearly established and the extent of judicial deference to agency fee regulations, based upon the OMB Fee Guidelines, remains somewhat unclear.[44]

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[37] See OMB Fee Guidelines, 52 Fed. Reg. at 10,019; see also Atkin v. EEOC, No. 91-2508, slip op. at 20-21 (D.N.J. Dec. 4, 1992) (agency's decision to aggregate requests found proper; it was reasonable for agency to believe that 13 requests submitted within three-month period relating to same subject matter were made by requester to evade payment of fees) (appeal pending).

[38] See OMB Fee Guidelines, 52 Fed. Reg. at 10,019-20.

[39] 5 U.S.C. § 552(a)(4)(A)(vi).

[40] See OMB Fee Guidelines, 52 Fed. Reg. at 10,017, 10,018.

[41] Compare Oglesby v. United States Dep't of the Army, 920 F.2d 57, 70 n.17 (D.C. Cir. 1990) (fee waiver issue not reached because plaintiff failed to exhaust administrative remedies) with St. Hilaire v. Department of Justice, No. 91-0078, slip op. at 4-5 (D.D.C. Sept. 10, 1991) (fee waiver issue not reached because requested records made publicly available).

[42] See 5 U.S.C. § 552(a)(4)(A)(vii) (specifying new de novo/administrative record standard and scope of review for fee waiver issues).

[43] 5 U.S.C. § 706 (1988).

[44] Compare Media Access Project v. FCC, 883 F.2d 1063, 1071 (D.C. Cir. 1989) (agency's interpretation of its own fee regulations "must be given at least some deference") with National Sec. Archive v. DOD, 880 F.2d at 1383 (question of deference owed to agency's fee regulations not resolved).